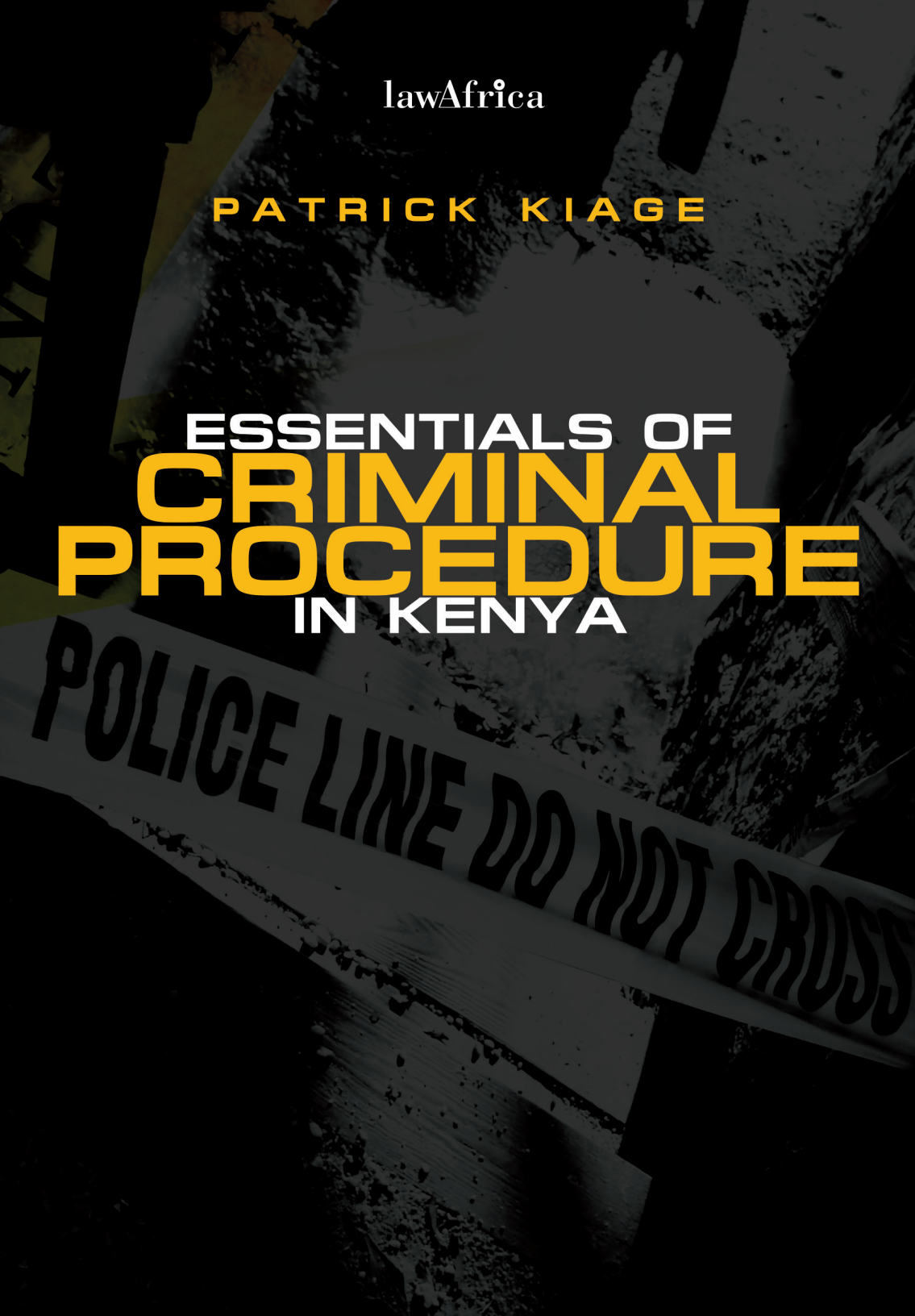




lawAfrica

PATRICK KIAGE

ESSENTIALS OF
CRIMINAL
PROCEDURE
IN KENYA

POLICE LINE DO NOT CROSS

VISIT...

LANZAROTE
Caliente.COM

ESSENTIALS OF CRIMINAL PROCEDURE IN KENYA

ESSENTIALS OF CRIMINAL PROCEDURE IN KENYA

Patrick Kiage

lawAfrica

Published by:

LawAfrica Publishing (K) Ltd.
Top Plaza, 3rd Floor
Kindaruma Road, (Off Ngong Road)
P.O. Box 4260-00100 GPO
Nairobi, Kenya
Wireless: +254 20 249 5067
Cell: +254 708 898 189
Fax: +254 20 249 5067

LawAfrica Publishing (U) Ltd
Office Suite, No. 2
Plot 10A Jinja Road (Opposite NEMA House)
P.O. Box 6198
Kampala, Uganda
Phone: +256 41 255808
Fax: +256 41 347743

LawAfrica Publishing (T) Ltd
Co-Architecture Building, 7th Floor
India/Makunganya Street
P.O. Box 38564
Dar-es-Salaam, Tanzania
Phone: +255 22 2120804/5
Fax: +255 22 2120811

Email: sales@lawafrica.com

Website: www.lawafrica.com

© Reprint 2013

© Reprint 2012

© Patrick Kiage 2010; LawAfrica

ISBN 9966-1511-1-7

lawAfrica

Copyright subsists in this work. No part of this work may be reproduced or transmitted in any form or means, or stored in a retrieval system of any nature without the prior publisher's written permission. Any unauthorized reproduction of this work will constitute a copyright infringement and render the doer liable under both criminal and civil law.

Application for permission for use of copyright material including permission to reproduce extracts in other published works shall be made to the publishers. Full acknowledgement of the author, publisher and source must be given.

Whilst every effort has been made to ensure that the information published in this work is accurate, the author, the editors, publishers and printers take no responsibility for any loss or damage suffered by any person as a result of reliance upon the information contained herein.

TABLE OF CONTENTS

Foreword.....	xi
Preface.....	xiii
Dedication.....	xv
Acknowledgement.....	xvii
Table of Statutes.....	xxix
Table of Cases.....	xxxv

Chapter One: Nature of Criminal Proceedings

1.1 Introduction.....	1
1.2 Players in Criminal Proceeding.....	2

Chapter Two: Criminal Courts

2.1 The Judiciary.....	10
2.2 The Court of Appeal.....	13
2.3 The High Court.....	15
2.4 Subordinate Courts.....	20

Chapter Three: Searches

3.1 Searches with a Warrant.....	23
3.2 Professional Privilege.....	27
3.3 Can a Search Warrant be used more than once?.....	29
3.4 Searches without a warrant.....	30

Chapter Four: Arrests

4.1 General provisions relating to Arrests.....	33
a) Arrest without a Warrant.....	35
b) Arrest with a Warrant.....	38
4.2 Validity of Warrants.....	39
4.3 Irregularities and Defects in a Warrant.....	41
4.4 Can a Warrant of Arrest be used more than once?.....	41
4.5 Miscellaneous Provisions regarding Process.....	42
4.6 Rights of Arrested Persons.....	42
4.7 Constitutional issues raised by Arrests.....	44

*Essentials of Criminal Procedure in Kenya***Chapter Five: Prosecution**

5.1 Legal Basis of Public Prosecutions.....	51
5.2 Decision to Prosecute.....	52
5.3 Challenging Prosecutions.....	55
5.4 Role of Prosecutor.....	59
5.5 <i>Nolle Prosequi</i>	63
5.6 Private Prosecutions.....	66

Chapter Six: Charges and Informations

6.1 Institution of Criminal Proceedings.....	71
6.2 The Charge Sheet.....	72
6.3 Joinder of Counts.....	72
6.4 Joinder of Persons.....	74
6.5 Rules for the Framing of Charges.....	75
6.6 Duplicity.....	78
6.7 Overloaded Charges.....	80
6.8 Defective Charges.....	84
6.9 Amendment of Charges.....	85
6.10 Quashing Charges or Informations.....	87

Chapter Seven: Pleas

7.1 Taking a Plea.....	89
7.2 Possible Pleas.....	89
7.3 Recording Pleas.....	89
7.4 Procedure in recording a Plea of Guilty.....	90
7.5 Plea of Guilty in the Absence of the Accused.....	97
7.6 Procedure on the Plea of Not Guilty.....	98
7.7 Refusal to take a Plea.....	98
7.8 Pleas of Several Accused.....	99
7.9 Pleas to Several Charges against an Accused.....	100
7.10 General Provisions relating to the Plea of <i>Autrefois Acquit</i> and <i>Autrefois Convict</i>	100
7.11 Plea of <i>Autrefois Acquit</i>	101
7.12 Plea of <i>Autrefois Convict</i>	102
7.13 Procedure in case of Previous Conviction.....	102
7.14 Objection to Jurisdiction.....	103

Table of Contents

7.15	Change of Plea.....	104
7.16	Retraction of Pleas.....	105
7.17	Plea Bargaining.....	105
7.18	Recording of Plea Agreement by Court.....	107
7.19	Rejection of Plea Agreements.....	108
7.20	Withdrawal of Pleas.....	109
7.21	Finality of Judgment.....	109

Chapter Eight: Bail

8.1	Definition.....	111
8.2	The Object of Bail.....	111
8.3	Bail as a Constitutional Right.....	111
8.4	The Nature of Bail.....	117
8.5	Bailable and Non-Bailable Offences.....	118
8.6	Classification of Bail.....	121
8.7	Sureties and Discharge of Sureties.....	127
8.8	Discharge of Sureties.....	128
8.9	Forfeiture of Recognizance.....	129
8.10	Bail pending Appeal.....	129
8.11	Anticipatory Bail.....	132
8.12	Conditions that may be imposed by Court.....	133
8.13	Rationalization of Bail.....	134

Chapter Nine: The Trial Process

9.1	Appearance of Parties.....	137
9.2	Adjournments.....	138
9.3	Case for the Prosecution.....	141
9.4	Mode of Taking and Recording Evidence.....	142
9.5	Close of Prosecution Case.....	144
9.6	Case for the Defence.....	145
9.7	Competence and Compulsion of Witnesses.....	147
9.8	Issue of Commission for Examination of Witnesses.....	148
9.9	Swearing and Affirmation.....	149
9.10	Affirmations.....	149
9.11	Examination.....	149
9.12	Difficult Witnesses.....	152

Essentials of Criminal Procedure in Kenya

9.13 Penalty for Non-Attendance of Witnesses..... 154

9.14 Special Witnesses..... 154

9.15 Witness Protection..... 158

9.16 Trial of Children..... 158

9.17 Transfer of Cases..... 160

9.18 Principles governing a Fair Trial..... 161

Chapter Ten: Judgment and Sentencing

10.1 Judgment..... 173

10.2 Convictions for Offences other than those Charged..... 175

10.3 Sentencing..... 177

10.4 Mitigating Circumstances..... 181

10.5 Victim Impact Statements..... 181

10.6 Committal to Higher Court for Sentencing..... 183

10.7 Motion in Arrest of Judgment..... 183

10.8 Reservation of Questions..... 184

10.9 Factors to be considered before Sentencing..... 184

10.10Types of Sentences..... 185

Chapter Eleven: Appeals and Revisions

11.1 Appeals..... 193

 11.1.1 Appeals from Subordinate Courts..... 194

 11.1.2 Number of Judges on Appeal..... 195

 11.1.3 Time of Appeal..... 196

 11.1.4 Petition of Appeal..... 196

 11.1.5 Summary Disposal of Appeals..... 197

 11.1.6 Powers of the High Court..... 198

 11.1.7 Power to take further Evidence..... 199

11.2 Retrial..... 200

 11.2.1 Abatement of Appeals..... 201

 11.2.2 Second Appeals..... 201

 11.2.3 Bail pending Appeal..... 203

 11.2.4 Appeals from the High Court..... 204

11.3 Revision..... 205

 11.3.1 Powers of the High Court on Revision..... 206

 11.3.2 Number of Judges on Revision..... 207

Table of Contents

11.3.3 High Court Order to be certified to Lower Court..... 207

11.4 The Failure of Justice Test..... 208

Chapter Twelve: Inquests..... 209

Chapter Thirteen: Habeas Corpus..... 213

Chapter Fourteen: Special Processes

14.1 Sexual Offences..... 215

14.2 International Criminal Justice..... 216

14.3 Anti Corruption and Economic Crimes..... 216

Index..... 219

FOREWORD

In *Essentials of Criminal Procedure in Kenya*, Patrick Kiage has written a valuable and indispensable book for any person interested in Kenya's criminal practice and procedure.

Written in a clear, concise and engaging style this book presents the entire criminal process in a simple, yet authoritative and informative way. The core principles that underpin the criminal procedure, their rationale and assumptions are well articulated and critiqued. In addition the book presents by way of illustration a comprehensive range of the latest local judicial decisions.

The author's triple heritage as a defence lawyer, state prosecutor and university teacher makes the book stand out as a well informed and balanced work. More importantly the author presents some practical proposals for reform of the criminal procedure, informed not the least by the dictates of our new Constitution.

The didactic treatment of the subject, combining a descriptive approach with incisive analysis blends the theoretical and practical aspects of the criminal justice system into one whole and offers the law student a firm foundation in criminal procedure. For their part, practitioners at the criminal bar, be they young and fresh or seasoned "fogies" should find this book a valuable resource and reliable quick reference.

I am sure that the readers and users of this book will find it as informative and useful as I did.

Kathurima M'Inoti

Chairman

Kenya Law Reform Commission.

PREFACE

When I was first tasked with teaching Criminal Procedure and Practice to second-year law students at the Catholic University of Eastern Africa (CUEA), I rather fancied that my then over-fifteen years experience at the criminal bar was sufficient. How wrong I was!

As I set about explaining, expounding and expanding, with a sprinkling of anecdotes of the war stories kind, what the rules were as set out in the Criminal Procedure Code, I found myself moving inexorably beyond the descriptive to the analytical. It was not enough to tell my students what the rules were. I needed as well to posit a controlling philosophy, a normative chain that explained the why of the rules. The rules were not an end in and of themselves. They served the higher purpose of ensuring that the criminal justice system not only ensured (or attempted to ensure!) that the guilty were punished, but also that the process of establishing guilt was not itself an instrument of abuse.

The interaction between the drive for justice and the respect for fair play or natural justice readily exposed itself to me as a veritable balancing of competing interests and, with the contemporary movement towards victim's justice as embodied in such new processes as witness protection and victim voice through Impact Statements and restitution or compensation orders, a more accurate formulation is the triangulation of interests.

Conceptualized in this manner, and bearing in mind the many changes that have taken place in the criminal justice terrain, it soon became obvious to me that there was a dearth of up-to-date material to which I could with assurance refer my students for that essential view of Criminal Procedure and Practice.

Thus was the idea of this book born.

In attempting to address what I perceived to be a gap in this area, I did struggle with the question of just how much material I needed to include in this book and even then the depth to which I needed to delve in order to address the essentials of each topic. In the end, I settled for the formulation suggested by the Course Outline for the subject at CUEA Law but did so in a manner that attempted to be faithful to motions of the criminal justice process as gleaned from the Criminal Procedure Code (Cap 75) itself and from my experience first as a criminal defense lawyer and later as a Special State Prosecutor. I have attempted to provide a rational

Essentials of Criminal Procedure in Kenya

flow and progression of that process while giving explanations where necessary and, in some instances, critiquing the lack of any discernible rationale for some of the rules and processes.

Owing to the serious and deserved attention some of the emerging areas of criminal practice are receiving and will continue to receive, I have made special mention of the Anti Corruption and Economic Crimes Act, the Sexual Offences Act and the International Crimes Act that embody these developments. Inevitably, that particular chapter is a brief one for the reason that the statutes are at their infancy and the peculiar jurisprudence on them is still anticipated. Nonetheless, in my way of thinking, they deserve special mention and are worthy of further study.

As fate would have it, the New Constitution of Kenya was promulgated when the manuscript was already with the Publisher. I was forced to make mention of some of the provisions more immediately felt in the criminal justice process, but, doubtless, the full impact of the new law will be felt only with the passage of time and will be marked with appropriate emergent jurisprudence.

DEDICATION

This book is specially dedicated to CAROLE, MARVIN and SAMORA – my wife and sons – who had to endure my silent or late nights (alas, often both!) and spasmodic absences. I hope you find it worth it . . . almost.

ACKNOWLEDGMENTS

For the initial materials that enabled me to take the teaching of Criminal Procedure and Practice, I am greatly indebted to my colleague at CUEA Law Miss Naomi Njuguna (later Mrs. Otundo) who may not recall that but for her plea early on, I might have quit teaching altogether. My thanks go to Justry Nyaberi, also of CUEA Law who first encouraged me to return to academia and thereafter kept telling me it is possible, nay, necessary, to not only teach, but also write.

Many of my insights into the considerations and processes that go into the making of prosecutorial decisions as well as a view of the criminal justice process would not have been possible without the opportunity to serve as a Prosecutor at the Department of Public Prosecutions under Keriako Tobiko. His trusting me with difficult criminal cases involving complex procedural issues while graciously acknowledging my academic leanings greatly empowered and encouraged me.

My friend and former teacher Kathurima M'Inoti took time off his extremely busy schedule at the vanguard of Kenya's legal transformation to painstakingly go through the entire manuscript in the raw. He raised many useful comments, criticisms and questions which aided me immensely in finalizing the task. Such is his kindness that he agreed to pen the foreword to the book. I owe him a huge debt of gratitude.

The discussion on bail and especially the intriguing implications of the removal of the capital-cases exception benefited immensely from Honourable Justice Fred Ochieng'. I thank him for sparing much of an afternoon sharing his insights in his inimitable candour and verve.

I tested many of my ideas and perceptions about court decisions and sections of the Criminal Procedure Code with my colleague Anne Koross Kipingor who generously gave of her time at Kiage & Co. Advocates and I thank her for her patience and insight.

Many thanks go to Olivia Msafiri Mjomba who spent countless weeks researching numerous cases and points that I threw at her and then typed the entire manuscript and tracked all the changes that I made along the way. She was a worthy Research Assistant.

I thank my publisher for the enthusiasm with which my manuscript was

Essentials of Criminal Procedure in Kenya

received and I especially mention Maina Waweru whose robust faith and clear vision of what may be possible in legal research and writing is invigorating.

Martha Wambui and Bonface Muema both played important parts in enabling me to put this book together and I thank them.

For generously availing his tranquil and serene Pink Lake Lodge, there by the Elementaita, as the setting for several days of work on this book, I say thank you to Francis Kimani.

Last, but by no means least, I record my sincere gratitude to Irene Mutai for her encouragement, belief and grace around this book against odds too many to count.

The input and efforts of the persons I have mentioned should be accounted to the acceptable and better parts of this work. As for any errors, mistakes, misrepresentations exaggerations or heresies that this book may contain, I take sole and full responsibility.

TABLE OF STATUTES

A

Administration Police Act, Cap 85 Laws of Kenya

s 10(1) (a).....	31
s 10(1) (b).....	30
s 10(2).....	31
s16.....	30

Anti Corruption and Economic Crimes Act, No.3 of 2003

s 3.....	217
s 4(4).....	217
s 5(1).....	217
s 35.....	7

Appellate Jurisdiction Act, Cap 9 Laws of Kenya

s 3(2).....	14
s 3(3).....	14
s 4.....	14
s 31.....	13
s 59.....	14

C

Children Act, Act No. 8 of 2001

s 2.....	
s 73.....	158
s 73 (i).....	159
s 73 (ii).....	159
s 73 (iii).....	159
s 73 (iv).....	159

Civil Procedure Act, Cap 21 Laws of Kenya..... 58

Community Service Orders Act, Act No. 10 of 1998

s 3(1).....	190
s 3(2).....	190
s 3(3).....	190
s 3(5).....	191

Essentials of Criminal Procedure in Kenya

Constitution of Kenya

Article 1.....	43
Article 22.....	18
.....	133
Article 22(2).....	15
Article 23(3).....	17
.....	46
.....	133
Article 24.....	25
Article 25.....	50
.....	25
Article 25(c).....	161
Article 27.....	120
Article 35(1).....	166
Article 49(1)(h).....	113
.....	117
Article 49.....	42
Article 49(2).....	135
Article 50.....	161
Article 50(1).....	162
.....	162
Article 50(2).....	97
Article 50(2)(a).....	164
Article 50(2)(b).....	164
Article 50(2)(c).....	139
.....	165
Article 50(2)(e).....	163
Article 50(2)(g).....	166
Article 50(2)(h).....	167
Article 50(2)(i).....	168
Article 50(2)(j).....	61
.....	166
Article 50(2)(k).....	168
Article 50(2)(l).....	168
Article 50(2)(m).....	169

Table of Statutes

Article 50(2)(n).....	169
Article 50(2)(o).....	169
Article 50(2)(p).....	170
Article 50(2)(q).....	171
Article 50(4).....	26
.....	170
Article 50(5).....	170
Article 50(6).....	171
Article 50(8).....	164
Article 50(9).....	164
Article 51(1).....	50
Article 51(2).....	50
Article 53(1)(f)(i).....	159
Article 53(1)(f)(ii).....	159
Article 133(1)(a).....	218
Article 147(7).....	65
Article 157(4).....	7
Article 157(6).....	51
.....	64
Article 157(6)(b).....	66
Article 157(7).....	51
.....	63
Article 157(8).....	52
Article 157(9).....	52
.....	64
Article 157(12).....	53
Article 159(2).....	10
Article 162.....	12
Article 163.....	13
Article 164.....	13
Article 165.....	15
Article 165(3)(b).....	15
Article 165(3)(e).....	18
Article 165(6).....	20
.....	58

Essentials of Criminal Procedure in Kenya

Article 169.....	12
Article 244.....	6
Article 245(4).....	7
Repealed Constitution of Kenya	
s 67.....	20
s 72.....	46
s 72(5).....	112
s 77.....	161
s 77(6).....	218
s 84(1).....	133
s 84(2).....	133
Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the individual) High Court Practise and Procedure Rules 2001, No. 133 of 2001.....	18
Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practise and Procedure Rules 2006, No. 6 of 2006	
r 8.....	18
r 11.....	17
r 12.....	17
r 13.....	17
r 15.....	17
r 20.....	18
r 26.....	17
r 29.....	18
Criminal Law Amendment Act No. 5 of 2003	
s 59.....	3
Criminal Procedure Code, Cap 75 Laws of Kenya	
Part IXA.....	2
s 2.....	3
s 4.....	21
s 5.....	22
s 6.....	22
s 7.....	22
s 8.....	22

Table of Statutes

s 12.....	22
s 14.....	22
s 21.....	33
s 22(1).....	33
s 22(2)(1).....	33
s 23.....	33
.....	34
s 24.....	34
s 25.....	31
s 26.....	30
s 26(1).....	34
s 26(2).....	34
s 28.....	35
.....	99
s 28(1).....	35
s 29.....	31
s 30.....	36
s 31.....	36
s 32.....	36
s 33.....	36
s 34.....	37
s 35.....	37
s 36.....	37
.....	119
s 37.....	37
.....	110
s 39.....	37
s 40.....	37
s 41.....	37
s 42.....	38
s 78 (1).....	160
s 78 (2).....	160
s 79.....	160
s 80.....	160
s 81(2).....	160

Essentials of Criminal Procedure in Kenya

s 82.....	63
s 86.....	5
s 87.....	68
s 87(a).....	101
s s 88.....	66
s 88(1).....	67
s 89(2).....	71
s 89(3).....	71
s 89(4).....	71
s 89(5).....	71
s 90(1).....	71
s 90(2).....	71
s 90(3).....	71
s 101.....	37
.....	38
s 102.....	38
s 102(3).....	38
s 103.....	38
s 104.....	24
.....	38
s 105.....	38
s 106.....	24
.....	38
s 107.....	38
s 108.....	38
s 109.....	24
.....	38
s 110.....	38
s 111.....	38
s 112(1).....	38
s 112(2).....	38
s 113.....	38
s 114.....	42
s 115.....	42
s 116.....	42

Table of Statutes

s 118.....	23
s 119.....	24
s 120(1).....	24
s 120(2).....	24
s 120(4).....	27
s 121.....	28
s 122.....	24
s 122(3).....	24
s 123.....	119
s 123(1).....	113
s 123(2).....	117
s 124.....	127
s 126.....	127
s 127.....	127
s 128.....	128
s 129.....	127
.....	128
s 130.....	128
s 131(1).....	129
s 131(2).....	129
s 131(4).....	129
s 131(5).....	129
s 131(6).....	129
s 132.....	129
s 135(1).....	72
s 135(2).....	78
s 136.....	74
s 137.....	75
s 137(a).....	76
s 137(a) (iii).....	77
s 137(a) (iv).....	77
s 137(b) (ii).....	78
s 137(c) (i).....	82
s 137(e).....	83
s 137(f).....	83

Essentials of Criminal Procedure in Kenya

s 137(g).....	83
s 137(h).....	83
s 137(i).....	84
s 138.....	84
.....	100
s 139.....	100
s 140.....	100
s 141.....	100
.....	102
s 142(3).....	102
s 145.....	147
.....	150
s 146.....	147
s 149(1).....	154
s 149(2).....	154
s 149(3).....	154
s 149(4).....	154
s 126(1).....	154
s 126(2).....	154
s 150.....	150
s 151.....	149
s 152.....	153
s 152(1).....	153
s 152(2).....	154
s 152(3).....	154
s 154(1).....	148
s 154(2).....	148
s 155(1).....	148
s 155(2).....	148
s 159(3).....	174
s 162(1).....	157
s 162(2).....	157
s 162(3).....	157
s 162(4).....	157
s 162(5).....	157

Table of Statutes

s 163(1).....	158
s 163(2).....	158
s 163(3).....	158
s 168(2).....	173
s 169(1).....	173
s 169(2).....	174
s 170.....	174
s 177.....	108
s 179(1).....	175
s 179(2).....	175
s 181(1).....	175
s 181(2).....	175
s 181(3).....	175
s 181(4).....	175
s 182.....	176
s 183.....	176
s 187.....	177
s 190.....	177
s 191.....	175
s 197(1).....	142
s 198(1).....	143
s 197(2).....	143
s 197(3).....	143
s 199.....	143
s 202.....	137
s 203.....	138
s 204.....	4
s 205.....	138
s 205(1).....	138
.....	141
s 206(1).....	140
.....	141
s 206(2).....	141
s 206(4).....	141
s 207.....	89

Essentials of Criminal Procedure in Kenya

s 207(3).....	98
s 207(4).....	99
s 207(5).....	89
s 208(3).....	151
s 210.....	144
s 214(1).....	85
s 214(1) (i).....	86
s 214(1) (ii).....	86
s 214(2).....	86
s 214(3).....	86
s 217.....	175
s 218.....	177
s 221(2).....	183
s 221(3).....	183
s 275(1).....	85
s 275(3).....	87
s 275(4).....	74
s 276.....	87
s 277.....	102
s 300.....	141
s 302.....	151
s 306(1).....	145
s 306(3).....	146
s 307.....	152
s 307(1).....	146
s 329A.....	5
.....	182
s 329B.....	182
s 329C (1).....	182
s 329C (3).....	182
s 329C (4).....	182
s 329D (1).....	182
s 329D (2).....	182
s 329D (3).....	182
s 329E (1).....	182

Table of Statutes

s 329E (2).....	183
s 351.....	196
.....	197
s 352.....	196
s 352(2).....	197
s 359(1).....	196
s 359(2).....	196
s 324.....	183
s 325.....	183
s 326.....	184
s 327(1).....	184
s 327(2).....	184
s 328.....	184
s 329A.....	182
s 347.....	18
s 348.....	18
.....	96
s 348A.....	19
s 353.....	198
s 354(1).....	198
s 354(2).....	198
s 354(3).....	198
s 354(4).....	198
s 354(5).....	198
s 354(6).....	199
s 355(1).....	199
s 356(1).....	130
s 356(2).....	132
s 357.....	119
s 357(1).....	131
s 360.....	201
s 361(1).....	201
s 361(1) (a).....	201
s 361(2).....	201
s 361(3).....	201

Essentials of Criminal Procedure in Kenya

s 361(4).....	201
s 361(5).....	201
s 361(6).....	201
s 361(7).....	201
s 361(8).....	201
s 362.....	201
.....	206
s 363.....	206
s 364(2).....	206
s 364(3).....	206
s 364(4).....	206
s 364(5).....	207
s 366.....	207
s 379(1).....	204
s 379(1) (a).....	204
s 379(1) (b).....	204
s 379(2).....	205
s 379(3).....	96
.....	205
s 379(4).....	205
s 379(5).....	205
s 379(5A).....	205
s 379(6).....	205
s 385(1).....	199
s 385(2).....	200
s 385(3).....	200
s 385(4).....	199
s 386(1).....	209
s 386(2).....	209
s 387(1).....	210
s 387(2).....	210
.....	211
s 387(3).....	210
s 387(4).....	210
s 387(5).....	210

Table of Statutes

s 387(6).....	210
s 388(1).....	211
s 388(4).....	211
s 389(1).....	213
s 389(2).....	213
Criminal Procedure Code (Amendment) Act, Kenya Gazette Supplement 2008	
ss A (1).....	106
ss C (1).....	106
ss C (2) & (3).....	106
ss A (3).....	106
ss A(4).....	106
ss B.....	106
ss D.....	107
ss E.....	107
ss J4.....	109
ss K.....	109
ss L(1).....	109
ss L(2).....	109
ss L(3).....	109
E	
Evidence Act, Cap 80 Laws of Kenya	
s 180(1).....	27
s 125(1).....	147
s 128.....	147
s 161.....	152
I	
International Crimes Act, No. 16 of 2008.....	216
M	
Magistrate's Court Act Cap 10 Laws of Kenya	
s 3(2).....	21

Essentials of Criminal Procedure in Kenya

s 6.....	178
s 7.....	178
s 7(5).....	178
s 14(1).....	179

O

Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya

s 15.....	149
s 16.....	149
s 19.....	142

P

Penal Code, Cap 63 Laws of Kenya

Chapter XXIX.....	177
s 25(1).....	185
s 25(2).....	186
s 25(3).....	186
s 26(1).....	186
s 26(2).....	186
s 28(3).....	187
s 29(2).....	188
s 29(9).....	187
s 30(1).....	188
s 30(2).....	188
s 31.....	188
s 32.....	188
s 33.....	188
s 35.....	189
s 43(1).....	189
s 47.....	189
s 47 (a)–(c).....	189
s 52(1).....	189
s 53(1).....	189
s 61(a).....	176
s 188(b).....	177

Table of Statutes

s 189.....	177
s 278.....	177
s 279(b).....	179
s 304(2).....	179
s 322.....	177
s 323.....	177
Police Act, Cap 84 Laws of Kenya	
s 19.....	23

S

Sexual Offences Act, No. 3 of 2006	
s 2(1).....	215
s 41.....	215
s 31.....	216
s 184.....	176
s 186.....	177
Statute Law (Miscellaneous Amendment Act) 2007.....	3
Stock and Produce Theft Act, Cap 355Laws of Kenya	
s 9.....	177

T

Traffic Act, Cap 403 Laws of Kenya	
s 46.....	176

TABLE OF CASES

A

Abdalla v Republic [1989] KLR 456.....	169
Abdi Hakim Alsafa v Republic [2007] eKLR (Miscellaneous Criminal Application No. 301 of 2007).....	38
Abdi v Republic [1991] KLR 171.....	130
Abel Monari Nyamamba and 4 others v Republic [1996] eKLR (Criminal App No. 86 of 1994).....	153
Adan v Republic [1973] EA 45.....	91
Adiedo v Republic [1969] EA 586.....	167
Akuti v Republic [1991] KLR 338.....	204
Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004....	47
Albanus Ongoto Mwencha v Republic [2004] eKLR (Succession Cause 89 of 1998).....	6
Alhaji Mujahid Dukubo Asari v Federal Republic of Nigeria SC 20A/2006.....	122
Alielo v Republic [2004] 2 KLR 333.....	57
.....	64
Alowo v Republic [1972] EALR 324.....	153
Alwi v Republic [1990] KLR 191.....	79
.....	90
Amber May v Republic [1979] KLR 38.....	145
Amolov Republic [1991] KLR 392.....	194
Anand v Republic [1952]20(2) K.L.R. 119.....	204
Anarita Karimi Njeru v Republic [1980] 1 KLR 272.....	16
Andiazi and another v Republic [1967] EA 813.....	146
Ann Njogu and 5 others v Republic High Court MIscellenoues Application No. 551 of 2007.....	47
Anthony Maneno v Republic [1993] eKLR (Criminal Appeal No. 46 of 1992).....	14
Atibu Juma v Republic [1983] eKLR (Criminal Appeal No. 898 of 1982).....	30
Attorney General v Shimanyula [1990] KLR 157.....	137

Essentials of Criminal Procedure in Kenya

Augastine Chebon Cheruiyot v Republic CA Criminal Appeal No. 16 of 1982.....	145
---	-----

B

Bakari and another v Republic [1987] KLR 173.....	186
Batala v Uganda [1974] EA 402.....	153
Baya v Republic [1984] KLR 647.....	99
Benjamin Munyao Nzioka v Republic [2004] eKLR (Criminal Appeal 74 of 2004).....	129
Bichange v Republic [2005] 2 KLR 4.....	206
Boit v Republic [2002] 1 KLR 815.....	93
Bukenya v Uganda [1972] EA 549.....	143
Buru v Republic [2005] 2 KLR 533.....	85
.....	177
Butler v Board of Trade [1971] Ch 680.....	29
Byamungu s/o Rusiliba v Republic [1951] 18 EACA 233 134.....	143

C

Catherine Nkerote v Republic High Court Criminal Appeal No.166 of 2006.....	95
Chacha v Republic [1953] 20 EACA 339.....	104
Charo v Republic [1982] KLR 308.....	90
Cherere v Republic [2004]eKLR (Misc. Crim. Appl. 553 of 2004).....	133
Chic Fashions (West Wales) Ltd. v Jones [1968] 2Q.B. 299.....	24
Clifford Derrick Otieno v Lucy Kibaki Misc App No. 5 of 2005 at Chief Magistrates Court.....	69
Coles v Coles (1866) LRIP & D 70.....	152
Cosma v Republic [1955] 22 E.A.C.A. 450.....	76
.....	81
Crazier v Cundey 108 E.R. 49.....	26
Crispus Karanja Njogu v The A.G High Court Criminal Application No. 391 of 2000.....	64

D

D.P .P. v Humphreys [1976] 2 All ER 497.....	56
Daniel Muhuti Kibera v Republic [1991] 2 KAR 272.....	132
Republic v Danson Mgunya and Another Mombasa HC Criminal Case No 26 of 2008.....	115
.....	121
David Waiganjo Wainina v Republic Criminal Appeal No. 113 of 2005.....	46
Dickenson v Brown[1974] 1 Esp. 218.....	41
Dickson Ndicho Kago v Republic High Court Miscellaneous Application No.639 of 2007.....	44
Diego v Republic [1985] KLR 621.....	86
Dillon v O’ Brien and Davis [1887] 16 Cox C.C. 245.....	28
.....	36
Duncan Wahome Wamae v Republic High Court Criminal Appeal No. 350 of 1968.....	81

E

Edwin Otieno Odhiambo v Republic Criminal Appeal No 359 of 2006.....	181
Eliud Njeru Nyaga v Republic (Criminal Appeal No. 182 of 2006).....	46
Erastus Kibiti Stephen v Euro Bank Ltd. and Another [2003] eKLR (Miscellaneous Criminal Application No. 9 of 2002).....	27
Eric Cheriuiyot Kotut v Republic [2006] eKLR (Misc Civ. Appli. 416 of 2006).....	161
Evans Kanai Karanja v Republic [2002] eKLR (Crim App 24 of 01).....	29
Evans Masese Mose v Republic [1955] EACA 484.....	82
Ezekiel Nyaga and 3 others v Republic (Criminal Appeal No. 9 of 1985).....	151

F

Fadweck Mvahe v the Republic SC 20A/2006.....	114
Frank Truman Export Ltd. and Others v Metropolitan Police Commissioner [1976 No. 2445].....	28

*Essentials of Criminal Procedure in Kenya***G**

Gabriel v Republic [1960] E.A.C.A 159.....	155
Gachara v Republic [2004] 1 KLR 373.....	44
Gachuru v Republic [2005] 1 KLR 688.....	203
Ganji v Republic [1910-20] ULR 101.....	90
Ganriel Kamau Njoroge v Republic [1982-88] 1 KAR 1134.....	194
Ganzi and 2 others v Republic [1936-1951] 6 U.L.R. 161.....	80
.....	203
George Gitau Gathimba v Bishop Munge and another WC 20/07.....	211
Gerald Macharia Githuku v Republic [2008] eKLR (Criminal Appeal No.119 of 2004).....	48
Ghani v Jones 1907 1 QB. 693.....	29
Gichohi v Republic [2002] 1 KLR 214.....	174
Gisborne Herald Co. Ltd. v Solicitor General [1995] 3 NZLR 563.....	161
Githunguri v Republic [1985] KLR 34.....	57
Global Enterprises (PVT) Ltd v Robinson Malambo and another [2006] eKLR (Civil Case No. 53 of 2006).....	38
Godfrey Mandengwa v Republic [2004] eKLR (Criminal Application No. 627 of 2004).....	73
Godhana v Republic [1991] KLR 417.....	151
Gouriet v Union of Post Office Workers [1977] 3 All ER 70.....	66
Grace Stuart Ibingira v Uganda [1966] E.A. 45.....	213
Gregory and another v Republic thro' Nottingham and 2 others [2004] 1 KLR 547.....	52
.....	67

H

Hamisi v Republic [1951] 18 E.A.C.A. 217.....	155
Harrison Muli Muliti and another v Republic Criminal Appeal No 57 of 1986.....	99
Hassan v Republic [2005] 2 KLR 151.....	176
Hassani Mpanda v Republic [1963] EA 294.....	176
Henry Kimathi v Republic [2006] Eklr, Crim App No 10 of 2002.....	168
High Court Miscellaneous Application No. 61 of 1981.....	120

Hussen v Republic [1990] KLR 425.....	119
---------------------------------------	-----

J

James Maina Njuguna v Republic [2008] eKLR (Criminal Appeal No. 43 of 2007).....	41
James Muhia Muiruri v Republic [2008] eKLR Criminal Appeal 214 of 2007 and 215 of 2007 (Consolidated).....	41
John Faustin Kinyua v Republic High Court Criminal Appeal No 305 of 2009.....	141
John Hasakwa s/o Martin v Republic E.A.C.A. Cr. App No. 132 of 1954.....	200
John Muruitu Kigwe and Anor v Republic Criminal Case No. 223 of 2000.....	57
John Otieno Oloo Republic [2009] eKLR Criminal Appeal No 350 of 2009.....	155
Johnson Muiruri v Republic [1983] KLR 445.....	156
Joseph Amos Owino v Republic Criminal Appeal No. 450 of 2007 Court of Appeal.....	45
Joseph Mugola s/o Pudha v Republi E.A.C.A. Cr. App. 55 of 1952.....	104
Joseph v Republic [1954] 21 EACA 311.....	73
Joseph Wambua Mutunga and 3 others v Republic High Court Criminal Case No 23 of 2008 (Unreported).....	114
Julius Kamau Mbugua v Republic Criminal Appeal No 50 of 2008 (Unreported).....	49
Juma and others v Attorney General [2003] 2 EA 461.....	165

K

Kamundi v Republic [1973] EA 540.....	104
Kanda v Government of Malaya [1962] AC 322.....	164
Kariuki and others v Republic [1991] KLR 425.....	207
Kariuki v Republic [1984] KLR 809.....	91
Karuma Bukenya v Republic [1952] EACA 23.....	99
Kazungu Chome Ngala v Republic [2204] eKLR Criminal Case No 1178 of 2003 (Kwale).....	215
Kennedy Indiemia Onuse v Republic Criminal Appeal No 344	

Essentials of Criminal Procedure in Kenya

of 2006.....	178
Kiarie and another v Republic [1986] KLR 281.....	151
Kibilo v Republic [1971] EA 101.....	104
Kilome v Republic [1990] KLR 194.....	85
Kimani and M. Maina v Nathan Kahara [2007] eKLR (Criminal Appeal No. 8494 of 1999).....	66
Kimani v Kahara [1985] KLR 79.....	67
Kimemia and another v Republic [2004] 2 KLR 46.....	203
Kinyanjui v Republic [2004] 2 KLR 364.....	72
.....	80
.....	194
Kinyua v Republic [2002] 1 KLR 256.....	157
Kioko v Republic [1983] KLR 289.....	104
Kiokoi, Alfred Mumo v Republic Criminal Appeal No 251 of 2001.....	201
Kipng'eno arap Ng'eny v Attorney General [2001] eKLR (Miscellaneous Application No. 406 of 01).....	56
Kiringo v Republic [1982] KLR 213.....	203
Kisivi v Republic [1991] KLR 125.....	96
Kithome v Republic [2005] 2 KLR 170.....	86
Koome v Republic [2005] 1 KLR 575.....	200
Kurai v Republic [1991] KLR 77.....	5
Kuruma v The Queen [1954] Court of Appeal of East Africa.....	26
Kuvua v Republic [2005] 2 KLR 156.....	21
.....	139

L

Laban Koti v Republic [1962] EA 439.....	79
Lima and another v Republic [1991] eKLR (Crim App 110 of 1991).....	166
Lockhart Smith v Republic [1965] EA 211.....	167
Lokwacharia v Republic [2005] 2 KLR 379.....	174
Lusiit v Republic [1977] KLR 143.....	96

M

Macharia v Republic [2003] 2 EA 559.....	193
--	-----

Maina v Republic [1954] 21 EACA 252.....	86
Makupe v Republic [1989] KLR 523.....	200
Malebe v Republic [1982] KLR 320.....	75
Manager, Tank Building Contractors v Republic [1968] EA 143.....	98
Mangwera v Republic [1952] 18 EACA 150.....	92
Margaret Magiri Ngui v Republic [1985] KLR 268.....	112
Martino Judagi and others v West Nile District Administration [1963] EA 406.....	72
Medardo v Republic [2004] 2 KLR 433.....	4
Miranda v Arizona 384 US 436 (1966).....	43
Mohamed Khamis Mazrui and Others v Republic High Court Criminal Application No. 81 of 1985.....	125
Mohamed Saeed Akrabi v Republic [1956] 23 EACA 512.....	156
Mohamed v Republic [2003] KLR 338.....	44
Mohamed v Republic [2005] 2 KLR 138.....	142
.....	156
Mohammed and 3 others v Republic [2005] 1 KLR 722.....	145
Mohammed Bashir v Republic [1950] 24 KLR 88.....	86
Momanyi v Republic [2003] 1 EA 197.....	197
Mongella v Republic [1934] 1 EACA 152.....	75
Morris Ngacha Njuguna and 3 others v Republic Criminal Appeal No. 232 of 2006.....	45
Msiwa and another v Republic [1999] 2 EA 190.....	65
Mugema v Republic [1967] EA 676.....	139
Muiruri and 2 others v Republic [2002] 1 KLR 274.....	176
Muiruri v Republic [2003] KLR 552.....	200
Muite v Republic [1991] KLR 579.....	120
Mukisa Biscuit Co. v Westend Distributors Ltd 2 [1969] EA 696.....	103
Munguti v Republic [1984] KLR 727.....	104
Muraguri v Republic [1989] KLR 181.....	121
Muraya v Republic [2001] KLR 50.....	157
.....	200
Murini v Republic [1967] EA 542.....	163
Murunga v Republic [2008] 1 KLR 1.....	46
Musau v Republic [1980] KLR 54.....	143

Essentials of Criminal Procedure in Kenya

Musikiri v Republic [1987] KLR 69.....	155
Musyoki v Republic [2004] eKLR (Criminal Case No. 1330 of 2003)....	116
Muthara v Republic [1999] LLR 973(CAK).....	197
Mutuku v Republic [1982] KLR 313.....	100
Mwagoma and 3 others v Republic [1990] KLR 514.....	189
Mwaitige v Republic [1961] EA 470.....	78
Mwangi and another v Republic [1988] KLR 803.....	76
Mwangi v Republic [1974] EA 108.....	80
Mwangi v Republic [1984] KLR 595.....	143
Mwangi v Republic [2005] KLR 375.....	19
.....	199
Mwaniki v Republic [2001] KLR 161.....	194
Mwau v Republic [1985] KLR 748.....	64
Mwita v Republic [2004] 2 KLR 60.....	203

N

Narothhands vithlam v Republic [1957] EA 343.....	97
Nathan Browne Birundu v Republic High Court Criminal Application No. 896 of 2001.....	131
Ndabi v Republic [1987] KLR 304.....	97
.....	185
Ndede v Republic [1991] KLR 567.....	93
.....	96
Ndungu v Republic [2003] 1 EA 197.....	197
Nedermar Technology Limited v The Kenya Anti Corruption Commission and The Attorney General Petition No. 390 of 2006.....	1
Nemchand Govinji v Republic [1954]21 EACA 236.....	131
Ngibuini v Republic [1987] KLR.....	73
Ngigi v Republic [1987] KLR 98.....	91
Nguku v Republic [1985] KLR 412.....	143
Nguku v Republic [2004]2 KLR 5.....	203
Nilson v Republic [1970] EA 599.....	185
Njoka v Republic [2001] KLR 175.....	145
.....	179

Njoroge v Republic [1987] KLR 19.....	194
Njoroge v Republic [2002] 2 KLR 200.....	174
Njuki v Republic [1990] KLR 334.....	92
Nunes v Republic 16 K.L.R 126.....	67
Nyanchuma v Republic [2004] 1 EA 261.....	95
Nzingo v Republic [2004] 2 KLR 1.....	196
Nzioka v Republic [1987] KLR 613.....	79
Nzivo v Republic [2005] 1 KLR 699.....	142

O

Ochieng' v Republic High Court Criminal Appeal No. 10 of 1985.....	80
Odhambo v Republic (Civil Appeal No. 54 of 1989).....	19
Odhambo v Republic [2005] 1 KLR 564.....	193
Okang v Republic [1982-1988] 1KAR 276.....	197
Okello v Republic [1969] EA 378.....	104
Okello v Republic [2001] KLR 489.....	139
Okeno v Republic [1972] EA 32.....	194
Olel v Republic [1989] KLR 444.....	92
.....	94
.....	96
Ombena v Republic [1981] KLR 450.....	100
Omboga v Republic [1983] KLR 340.....	79
Omusa v Republic [2003] 1 KLR 230.....	195
Onkoba v Republic [1989] KLR 395.....	93
Onserio v Republic [1985] KLR 618.....	155
Onyango v Republic [1983] eKLR (Criminal Appeal No. 91 of 1983).....	13
Opinder Singh Naul v Republic Misc Cr. Application No. 178 of 1981.....	121
Opondo v R [1978] KLR 25.....	131
Oremo v Republic [1990] KLR 290.....	76
Otieno and another v Republic [1991] eKLR (Criminal Appeal No 55 of 1989).....	201
Ouma Ombenjo and another v Republic [2004] eKLR (Criminal Appeal 1017 of 2002).....	200

*Essentials of Criminal Procedure in Kenya***P**

Pandya v Republic [1957] EA 33.....	194
Pascal Nkala Tubula v Republic [1998]eKLR (High Court Criminal Appeal No. 82 of 1992).....	29
Patrick and another v Republic [2005] 2 KLR 162.....	203
Patrick Irungu Maina v Republic [2006] eKLR (Miscellaneous Application No. 27 of 2006).....	117
Pattni and another v Republic [2001] 2 KLR 264.....	161
Pattni v Republic [2005] 1 KLR 310.....	61
Paul Mburu Kamau and another v Provincial Criminal Investigation Officer Coast Province and another [2006] KLR 2.....	214
Peter Kipkemoi Cheruiyot v Republic CA Criminal Appeal No. 131 of 1981.....	145
Philbert Loizeau and another v Republic [1956] 23 E.A.C.A. 566.....	74
Popat v Republic [1944] 11 EACA 56.....	147
Prabulal v Republic [1971] EA 52.....	141
Pringle v Bremner and Stirling [1867] 5 Macrh. 55.....	26
Public Corruption, Ethics and Governance Watch v Hon Ali Chirau Makwere [2004] eKLR (Miscellaneous Criminal Application 522 of 2004).....	66

R

R v Kesington and Chelsea Royal London Borough Council ex parte Hammel [1989] 1 All ER 1202.....	58
R v Shah [1988] KLR 815.....	132
Raila Odinga v Professor George Saitoti Misc Appl No. 3 of 1995.....	68
Ramanlal Bhatt v Republic [1937] EA.....	144
Re Robinson [1854] 23 L.J. KB 286.....	117
Reg v Leatham 1861 Cox C.C. 498.....	26
Regina v Sussex Justices ex parte McCarthy [1924] 1 KB 256.....	161
Republic thro' Machakos Police Station v Nzioki and another [2003] KLR 459.....	201
Republic v Jotham Njoroge Kimani [2005] eKLR (Revision 4 of 2005).....	21

Republic v John Kahindi Karisa and 2 others Mombasa HC Criminal Case No 23 of 2010 (Unreported).....	115
Republic v Mwaura Ikego and another [1979] KLR 209.....	137
Republic v Payne [1950] 1 All ER 102; 34 Cr.App. R. 43.....	100
Republic v .F.J. Patel 13 E.A.C.A. 179.....	105
Republic v Abdi Ali 21(2) KLR 116.....	90
Republic v Adan Keynan Wehliye [2005] 1 KLR 837.....	64
Republic v Amirali [1971] E.A. 116.....	144
Republic v Amos Karuga Karatu [2008] eKLR(Criminal Case No. 12 of 2006).....	49
Republic v Atanas 17 K.L.R. 50.....	98
Republic v Atanas s/o Mwamere [1960] KLR 17.....	77
Republic v Attorney General and another ex parte Ng'eny [2001] KLR 612.....	1
Republic v B.M. Patel [1985] KLR 22.....	92
Republic v Cap Van International Limited and another [2004] eKLR (Revision Cause 6 of 04).....	2
Republic v Chairman, Lands Disputes Tribunal Kirinyaga District and another Ex parte Peter Maru Kariuki [2005] eKLR (Misc Civil Appeal 129 of 2004).....	11
Republic v Communications Commissions of Kenya ex parte East Africa Televisions Network Ltd [2001] KLR 82.....	58
Republic v Fulabhai Patel and another [1946] 13 EACA 179.....	105
Republic v George Samuel Sowe 14 KLR 172.....	76
Republic v Gikunju Karingu [1943] KLR 23.....	174
Republic v Gulamhussein Jetha, [1946] 13 EACA 107.....	73
Republic v Hassan wa Saleh and another [1906-08] 2 EALR 105.....	75
Republic v Hussein [2003] KLR 344.....	214
Republic v Hussen [1990] KLR 497.....	35
Republic v Jagani and another [2001] KLR 590.....	178
Republic v Jamal Din 12 EACA 75.....	117
Republic v James Njuguna Nyaga Criminal Case No. 40 of 2007.....	48
Republic v Joseph Wambua Mutunga and 3 others HC Criminal Case No 23 of 2008 (Unreported).....	43
.....	123

Essentials of Criminal Procedure in Kenya

.....	134
Republic v Kaingo s/o Kimani [1949] KLR 22.....	187
Republic v Kristofa Male and another [1934] 1 E.A.C.A.....	75
Republic v Kwirichia s/o Kinyua [1959] KLR 22.....	187
Republic v Loibori [1949] 16 EACA 86.....	77
Republic v Lute s/o Luzala 1 EACA 106.....	174
Republic v Maganbhai Patel 16 KLR 123.....	205
Republic v Malakwen Arap Kogo [1933] 15 KLR 115.....	184
Republic v Mohammed [1990] 569.....	154
.....	207
Republic v Mongella [1934] 1 EACA 152.....	79
Republic v Mwangi s/o Kamuhi and another [1920] 2 KLR 72.....	104
Republic v Mwaura [1979] KLR 209.....	4
Republic v Nasa Ginnors Ltd. [1955] 22 EACA 434.....	82
Republic v Nathu and another [1944] 11 EACA 6.....	101
Republic v Ndungi and others [1906-08] 2 EALR 85.....	75
Republic v Njoroge s/o Muroga [1947] E.A.C.A. 67.....	207
Republic v Oyier [1985] KLR 353.....	195
Republic v Pattni [2003] KLR 643.....	57
Republic v Pattni [2005] 1 KLR 310.....	3
.....	7
.....	61
Republic v Peter Kamau Ndambo Criminal Case No. 28 of 1993.....	56
Republic v Samwel Chepkonga Anti Corruption Case No.16 of 2003...	87
Republic v Sawedi Mukasa s/o Abdullah Aligwaisa 13 EACA 97.....	179
Republic v Selwyn and 5 others [1952] KLR 16.....	123
Republic v Sowedi Kauta [1933] 13 KLR 105.....	79
Republic v Subordinate Court of the 1st Class Magistratess and another Ex parte Yougindar Pall Sennik and another [2006] eKLR (Miscellaneous Application 652 of 2005).....	162
Republic v Taiko Kitende Muinya High Court Criminal Case No 65 of 2010 (Unreported).....	113
Republic v Talib Abubakar and 5 others Criminal Revision No. 1 of 2008.....	44
Republic v Waxman [1981] 22 Cr. App. R.....	131

Republic v Yonasani and others [1965] EACA 9.....	90
.....	178
Republic v Yonasani Egalo and others 9 EACA 65.....	78
Republic v Livingstone Ngare ACC No.5 of 2002.....	148
Republic v Ward [1993] 2 All ER 557.....	61
Roy Richard Elirema and another v Republic CA Criminal Appeal No. 67 of 2002.....	142
Ruhi v Republic [1985] KLR 373.....	140
.....	166
Rupert Nderitu and others v Republic Criminal Appeal 319 of 1985.....	63
R v King [1920] 15 Cr App R 13.....	96
R v Turner [1970] 54 Cr App 2352.....	96
.....	105
R v Inns [1974] 60 Criminal Appeal R 231.....	96

S

Saina v Republic [1974] EA 83.....	79
Samuel Kamau Macharia and Kibe v Attorney General High Court Miscellaneous Application No. 356 of 2000.....	57
Seanoi Parsimei ole Sisina and others v Attorney General Criminal case No. 345 of 2005 High Court.....	63
Semande v Uganda [1991] 1 EA 322.....	201
Shah v Patel and others [1954] 2 EACA 236.....	68
Shen Zhangua v Republic [2006] eKLR (Miscellaneous Criminal Application No. 396 of 2006).....	4
Shiguye v Republic [1975] EA 191.....	153
Shimechero v Republic Criminal Appeal No. 119 of 1974.....	44
Sigilai and another v Republic [2004] 2 KLR 480.....	75
Sinaraha v Republic [2004] 2 KLR 328.....	201
Sir Ali Bin Salim v Shariff Mohamed Shatry [1938] KLR 10.....	11
State v Makwanyane and M Mchunu Case No. CCT/3194.....	185
Stephen Chege v Republic [1983] eKLR.....	76
Stephen Muriungi and another v Republic [1982-1988] 1 KAR 60.....	203

Essentials of Criminal Procedure in Kenya

T

Tembere v Republic [1990] KLR 353.....	77
Thiong'o v Republic [2004]2 KLR 38.....	203
Thomas Patrick Cholmondley v Republic [2008] eKLR (Criminal Appeal No. 116 of 2007).....	60

V

Velezi Kashizhs v Republic [1954] EACA 389.....	74
Vitu Ltd v The Chief Magistrate at Nairobi and 2 others H.C Miscellaneous Application No. 475 of 2004.....	25

W

W' Njuguna v Republic [2004] 1 KLR 520.....	133
Wachira and others v Republic [1956] 23 EACA 562.....	99
Waithaka and another v Republic [1972] EA 184.....	150
Walome v Republic [1981] KLR 497.....	207
Wamithandi v Republic 3 EALR 101.....	90
Wanjiku v Republic [1984] KLR 697.....	180
Wanjiku v Republic [2002] 1 KLR 825.....	144
Wanyoni v Republic [1980] KLR 116.....	185
Watoro v Republic [1991] KLR 281.....	122
.....	124
Watt v Thomas [1947] AC 484.....	195
Waweru v Republic [1982] KLR 137.....	33
Wehliye v Republic [2005]1 KLR 837.....	51
William Dubi Ikiwo v Republic [2001] eKLR (Criminal Appeal No. 547 of 2001).....	85
William Ruto and others v Attorney General. High Court Misc Appl. No 1192 of 2005.....	3
William Sebugenyi v Republic [1959] E.A.411.....	86
Wilson v Republic [1955] 22 EACA 372.....	77
Woolmington v DPP [1935] AC 462.....	168

Y

Yussuf Gitta v Republic [1959] EA 21..... 166

Yusuf Ahmed v Republic [1959] EA 615..... 166

LIST OF ABBREVIATIONS

AC.....	Appellate Court
AG.....	Attorney-General
AP.....	Application
APP.....	Appeal
CPC.....	Criminal Procedure Code
Cr.....	Criminal
EA.....	East Africa
EACA.....	East African Court of Appeal
EALR.....	East African Law Report
HC.....	High Court
KACC.....	Kenya Anti Corruption Commission
KB.....	King's Bench
KLR.....	Kenya Law Reports
ULR.....	Uganda Law Report

OTHER MATERIALS USED

1. Archbold J F Criminal Pleading Evidence and Practice (38th ed Sweet and Maxwell London 1973)
2. Douglas B Criminal Procedure in Uganda Kenya (Law in Africa Kampala 1964) No 13
3. Gary S and Cavendish D K The English Legal System (Sixth Edition London 2003) pp 445-50
4. Inciardi JA Criminal Justice (seventh ed Oxford University Press New York 2002)
5. Judiciary of Kenya Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya
6. Kivutha Kibwana Law and the Administration of Justice in Kenya International Commission of Jurists General Printers Limited (1992)
7. Michael H) Macmillan English Dictionary (eds)(International Students' Ed 2006)
8. Michael D L and v ernon J G Practical Drug Enforcement (second ed) Practical Aspects of Criminal & Forensic Investigations (New York 2001) CRC
9. Oscar Foundation Report on Arrest, investigation and Prosecution by the Police in Kenya [2007]
10. Republic of Kenya The National Prosecution Policy (State Law Office 2007) pp 7
11. Spurling A C and Kennedy D C Digest & Guide to the Criminal Law of Kenya (Colony and Protectorate of Kenya) (second ed Kenya 1939-46)
12. Tapper C Cross and Tapper on Evidence (eighth ed Butterworths 1995)
13. The Nairobi Law Monthly Vol 1 Iss No 1 October 2010
14. Zander M Cases and Materials on the English Legal System (Sixth ed 1992) pp 250- 54

CHAPTER ONE

THE NATURE OF CRIMINAL PROCEEDINGS

1.1 INTRODUCTION

Criminal Procedure and Practice is a branch of law that concerns itself with the various stages and means by which persons who are alleged to have contravened the criminal law are dealt with or processed. Inevitably, the criminal trial itself is at the centre of this branch of the law but related aspects, both prior and incidental thereto are equally important.

It is a branch of the law concerned with the process as opposed to the substance of Criminal Law. It defines the procedures and the rules that govern the judicial aspect of the prevention, detection and punishment of crime. Depending on the crime in question, the procedure may be simple and short or elaborate, delicate and long.

In the case of the Attorney General's reference,¹ the House of Lords held that:

The purpose of the Criminal Law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.

Since the substance of Criminal Law reflects and is an embodiment of the steps of society's attempts to deal with delicts, the process by which it does so is necessarily one in which the public generally have an interest and; criminal procedure is to that extent public in nature. The procedure, however, is not dedicated merely to the end of exacting revenge or pay back against the culprit on behalf of society. Indeed in the case of *Republic v Attorney General and another ex parte Ng'eny*,² the High Court held that the function of any judicial system in civilized nations is to uphold the rule of law.

The subjects of the criminal process, the alleged culprits or perpetrators of crime are as much also members of the same society and they are not bereft of rights. There does exist an apparent paradox that declares the protection of culprits

1 No 3 of 1999 Cited in the case of *Nedermar Technology Ltd v KACC and AG* (HC) Petition no 390 of 2006.

2 [2001] KLR 612.

Essentials of Criminal Procedure in Kenya

and the mainstreaming of their due process rights a veritable matter of public interest.

There is a clearly discernable thread running through the entire criminal process, an inescapable tension between two main competing interests. On the one hand, there is the interest of the society, through the instrument of the State, to punish crime and on the other, the need to ensure that the rights and inherent dignity of the offender are respected. In the end the efficacy of our procedural law is to be determined by the manner in which it strikes a balance between them. Beyond the traditional protagonists in the criminal justice process, that is the State and the accused, there has been a deliberate effort in recent years to move from the periphery toward the centre an equally important constituency namely the victims of crime. The most tangible exemplar of that shift is the introduction in the year 2003 of a substantive new Part, dealing with victim impact statements, into the Criminal Procedure Code.³

It may therefore be more correct to assert from a conceptual or doctrinal standpoint that the criminal process embodies within itself not merely a balancing but rather a triangulation of interests.

1.2 PLAYERS IN CRIMINAL PROCEEDINGS:

Every criminal proceeding in a court of law will have various persons playing specific and defined roles. They include the following:

1.2.1 The State and the Accused

The main players, indeed the true *parties* to a Criminal trial would be the *State* on the one hand and the *accused* on the other, expressed as *Republic v X*.⁴ This underscores the public nature of criminal proceedings and the fact that even though individual citizens are often the wronged parties, it is the State itself that initiates and conducts the criminal proceedings on behalf of the public, generally. In colonial times and as reflection of the position of the monarch as the custodian of public rights and interests, the Queen (*Regina*) and before her the King (*Rex*) or the Crown would be the party contending with the accused in Court. In some jurisdictions, the State is represented in criminal proceedings as the Country e.g. *Uganda v X* or the *People v X* or the *Commonwealth v X*.

The centrality of the State and the accused was re-stated in the case of *Republic v Cap Van International Ltd and another*,⁵ where it was held that there are only two

³ Pt IXA of the CPC.

⁴ *Republic v Cap Van International Ltd and another* [2004] 2 KLR 348.

⁵ [2004] 2 KLR (Revision Cause 6 of 2004).

parties who are recognized in law; the Republic (which prosecutes cases) and the accused person. The complainant in a criminal case has no right of audience before a Court and can only communicate to the Court through the prosecutor.

1.2.2 Complainant

The term *complainant* occupies an important place in the criminal trial process but has also been a rather contested one. So much so that an attempt to define it in section 2 of the Criminal Procedure Code as *a person who lodges a complaint with the police or any other lawful authority*⁶ ended up having an extremely brief statutory life in that it was subsequently deleted by Act No. 7 of 2007.⁷ Under the Criminal Law (Amendment Act) No. 5 of 2003,⁸ a complainant is a person who lodges a complaint with the police or any other lawful authority.

It is of interest, though, that section 2 of the Criminal Procedure Code retains the definition of complaint as “an allegation that some person known or unknown has committed or is guilty of an offence”. It may therefore be said that even though a complainant is one who is directly, immediately and personally affected by the criminal acts of the accused and therefore makes a complaint, the State by virtue of having an interest in the protection of the rights of all its citizens may itself be seen as a complainant, with a right to not only complain, but also to prosecute.

Another reason why the State is a complainant is because it is the State that legislates on what constitutes a crime. Any breach thereof directly harms the State. It would therefore follow that it has the right to complain and prosecute. The view of the State as complainant in all criminal cases has recently found the most authoritative endorsement by a Constitutional Bench of the High Court in the case of *William Ruto and others v Attorney General*.⁹ The judgment should, barring an overturn on appeal, put to rest for the time being the many objections raised by accused persons to the effect that there is no discernible complainant especially in corruption cases where investigations are triggered by anonymous reports or the Kenya Anti Corruption Commission moves in *suo moto*.

So critical is the role and place of a complainant that where an accused person

6 s 59 of the Criminal Law Amendment Act no.5 of 2003 See also the case of *Republic v Pattni* [2005] 1 KLR 310.

7 The Statute Law (Miscellaneous Amendment Act) 2007.

8 *Ibid* s 59.

9 High Court Misc Appl. No 1192 of 2005. delivered on 15 October 2010.

Essentials of Criminal Procedure in Kenya

appears in a particular court at an appointed time for the trial but the complainant himself, having knowledge of the proceedings fails to appear, the court is empowered to acquit the accused person unless it deems it fit to adjourn the case until some other date.¹⁰ It is an interesting question to consider whether the presence of the prosecutor as the representative of the State, the nominal complainant, suffices to save a case from the inevitable acquittal due to the personal complainant's absence. It has been held in some cases, including *Republic v Mwaura*,¹¹ that a complainant includes a public prosecutor.

The complainant may also withdraw his complaint at any time before judgement is passed if he can satisfy the Court that there are sufficient grounds for permitting him to withdraw it. The accused is then acquitted.¹² Even though the Statute does not say so, a personal complainant cannot make such a withdrawal without the concurrence of the State in the person of the prosecutor.

Where the State and the complainant are agreed, though, it would not be proper for the Court to make it unduly difficult for a withdrawal. In the case of *Shen Zhangua v Republic*,¹³ the trial Court had declined to allow an application by the complainant to withdraw his case on the grounds that he did not give sufficient reasons to the Court for his application. Lesiit J., on appeal, held that the subordinate Court ought instead to have clarified the grounds given by the complainant which were in fact sufficient and proceeded to allow the withdrawal.

In *Medardo v Republic*,¹⁴ the Court held that under section 204 of the Criminal Procedure Code, if at any time before the final order is passed in a case a complainant satisfies the Court that there sufficient grounds for permitting him to withdraw his complaint, the Court may permit him to withdraw it and shall thereupon acquit the accused. The Court retains the discretion to allow the application for withdrawal but once it has exercised that discretion and allowed the withdrawal, it is bound to acquit the accused person. If the complainant is a child of tender years, the court is expected to test the intelligence of the child through a *voir dire* examination before deciding whether or not to subject him to the oath.¹⁵

Apart from his role in the making of a complaint, which he may in a proper

10 *Supra* nt 4, s 202 See also the case of *AG v Shimanyula* [1990] KLR 157.

11 [1979] KLR 209.

12 s 204 of the CPC.

13 [2006] eKLR (Miscellaneous Criminal Application No. 396 of 2006).

14 [2004] 2 KLR 433.

15 *Ibid.*

case withdraw and his critical role at the beginning of a trial, which is foundational to the prosecution's case, the complainant holds the key to any effort at reconciliation that may lead to an amicable settlement of the case facing an accused person. This has to be in an appropriate case involving common assaults or any other offences of a personal or private nature not amounting to felony and not aggravated in degree.¹⁶

The complainant also plays a role in helping the court determine what sentence to impose in cases where the offence results in the death or actual physical bodily harm to any person through the process of the victim impact statements since the complainant would necessarily be either the primary or family victim by way of victim impact statements.¹⁷

The complainant does not, however, have the right to address the court or, as the High Court stated in *Republic v Cap Van International Limited and another*,¹⁸ the complainant in a criminal case can only communicate to the court through the prosecutor. This is usually the case even where, as often happens, a complainant engages an advocate to hold a watching brief to observe the trial on his behalf. Such advocate may be noted on record and cooperate and communicate with the prosecutor but he may not himself address the court or examine witnesses.

1.2.3 Prosecutor:

The prosecutor in a criminal trial is the person who appears and pleads or presents the case of the state against the accused person; whether at the trial or appeal.¹⁹ Historically, public prosecutors were subject to the express directions of the Attorney General, whether general or specific and fell under three broad categories;²⁰

- i. Those exercising the Attorney General's delegated authority as officers at the State Law Office namely the Director of Public Prosecutions, Solicitor General and State Counsel of various ranks;
- ii. Gazetted Public Prosecutors appointed by the Attorney General either for Kenya generally or for any specified area. The Gazette notice spells out both the geographical and subject-matter (case type) competence or authority of the said prosecutors and;
- iii. Non-Gazetted public prosecutors who are appointed by the Attorney General in

16 *Supra* nt 8, s 176 See also the case of *Kurai v Republic* [1991] KLR 77.

17 s 329A of the CPC.

18 [2003] KLR (Revision Cause 6 of 04).

19 *Supra* nt 17, s 86.

20 *Ibid*, s 85

Essentials of Criminal Procedure in Kenya

writing from among advocates of the High Court of Kenya or persons employed in the public service. The appointment of this category is case-specific. Before the amendment to section 85(2) of the Criminal Procedure Code in the year 2007²¹ if such prosecutors were police officers, they had to hold the rank of assistant inspector police or above, a requirement that was much ignored. The amendment, essentially allowing any police officer to conduct prosecutions, was necessitated by numerous appeals where trials were declared nullities and convictions overturned merely because some junior police officer had conducted prosecutions.²²

The exclusive panoply of prosecutorial powers, including those of appointment of public prosecutors, previously donated to the Attorney General have now been rationalized, and in some respects curtailed, and transferred to an independent and constitutionally protected Director of Public Prosecutions under article 158 of the New Constitution.²³

The Constitution provides that pending the appointment of the first Director of Public Prosecutions in the new dispensation, his powers and functions shall be exercised by the Attorney General.²⁴ To bring this into effect, the Attorney General found it necessary to publish a Gazette notice indicating that he had delegated his functions under Transitional clause 31 to the Chief Public Prosecutor (a re-designation of the previous office of the Director of Public Prosecutions under the former Constitution) and other officers in the Department of Public Prosecutions.

1.2.4 The Police

Apart from the arguably anomalous role they play as prosecutors, the police perform investigative functions to ensure, ideally, that the case brought against the accused is substantial, weighty and supported by the evidence.

The investigative powers of the police are spelt out in the Police Act²⁵ and the Force Standing Orders made thereunder. Even though the New Constitution very curiously omits the prevention, investigation and detection of crime among the objects and functions of the National Police Service under Article 244, these

²¹ *Supra* nt 13.

²² *Albanus Ongoto Mwencha v Republic* [2004] eKLR (Succession Cause 89 of 1998).

²³ Even though the new DPP is now a constitutional office and cannot be removed on a whim, some of the more sweeping powers previously enjoyed by the Attorney General such as the untrammelled use of the *nolle prosequi* and the control of private prosecutions by take-over have been, in case of the former curtailed by the requirement of the court's leave and, for the latter, denied him.

²⁴ Clause 31(5) of the Sixth Schedule (Transitional and Consequential Provisions) made pursuant to Article 262

²⁵ Cap 84, Laws of Kenya.

The Nature of Criminal Proceedings

are clearly implied or presumed under Article 245(4). The Director of Public Prosecutions has power under Article 157(4) to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the latter is obligated to comply with any such direction, which must be in writing.²⁶

It seems that the power of the Director of Public Prosecutions to direct the Inspector General in mandatory terms as discussed above directly conflicts with Article 245(4)(a) of the Constitution, which declares that *no person* may give a direction to the *latter with respect to the investigation of any particular offence or offences*. It is not entirely far-fetched to foresee a situation where there is a constitutional impasse as long as the two rival positions remain in the Constitution unchanged. There is nothing objectionable about the Director of Public Prosecutions giving directions to the police in criminal investigations.

The opposing views on this matter came into play somewhat indirectly in *Republic v Pattni*,²⁷ where the High Court stated that whereas the Attorney General or his officers may require the Commissioner of Police to investigate, they cannot, following the instructions, be themselves involved in the investigations. This position appears to be questionable when viewed in light of international best practices which demonstrate that there is greater efficiency, efficacy and a more sure justice in jurisdictions where the practice of prosecutor-led investigations has taken root.

Even where investigations are conducted under powers donated by specific, specialized statutes such as by investigators working under the director of the Kenya Anti Corruption Commission, such investigators are still ultimately subject to the advice and control of the Attorney General.²⁸

1.2.5 Witnesses

Simply put, a witness is a person who, as a result of having been present, observed, experienced or dealt with an event or thing, is able to give an account of it in a court of law.

26 Article 245 (5)

27 [2005] 1 KLR 310.

28 By virtue of s 35 of the Anti Corruption and Economic Crimes Act, No 3 of 2003, a report on the results of an investigation must be made to the Attorney General who then decides on whether or not a person should be prosecuted. Moreover, the Attorney General still retains the ultimate authority as to the fate of any such prosecution.

Since the criminal trial is adjudicative in nature and aimed at establishing the truth or otherwise of allegations made against an accused person, witnesses play a central role. It is their testimony as to the facts in dispute as well as their production of documentary or physical evidence or opinions (in the case of experts) that aids the court in arriving at a just decision of the case.

1.2.6 Judge or Magistrate

He is the presiding officer of the Court and represents the authority and integrity of the judicial adjudicative process. His role is, in the main, passive as an impartial umpire in an adversarial legal system. It is his duty to scrupulously apply the procedural law as well as the rules of evidence to ensure that the criminal process with all its awesome potential is not used oppressively. His interventions should be kept to a minimum lest he be accused of descending into the arena of conflict where his vision may be blurred.

That said, it is arguable whether a strictly passive role on the part of the court conduces to the doing or attainment of substantial justice given that the contest between the all-powerful state mechanism and the often illiterate or unschooled and unrepresented criminal accused person is hardly a strictly fair contest.

It is upon the shoulders of the presiding judge or magistrate that the task of balancing or triangulating the various competing interests lies.

CHAPTER TWO

THE COURTS

HIERARCHY OF COURTS IN KENYA

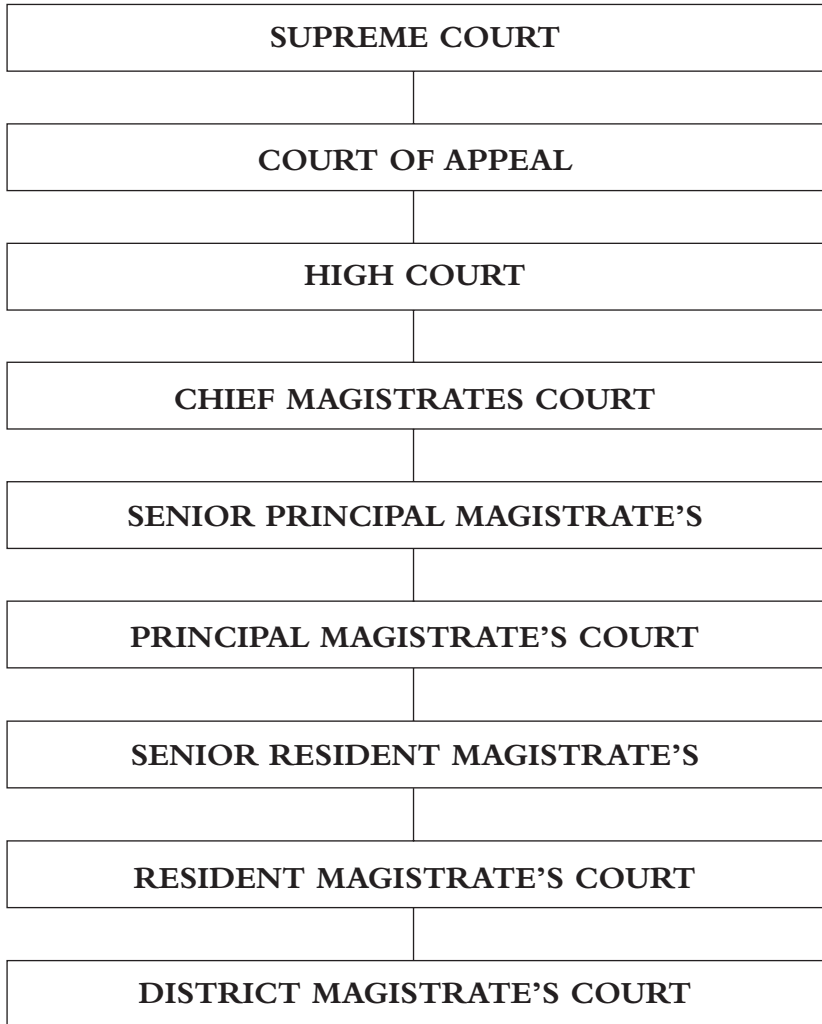


Figure 1

2.1 THE JUDICIARY

The Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff.²⁹ The judiciary or the Judicature is often conventionally viewed as the third arm of government. It established for the purpose of interpreting laws and adjudicating over and resolving disputes between citizens *inter se* and between citizens and the state.

The place and role of the Judiciary in Kenya's social-political history has not been a happy one. Far from being a bastion of liberty for the citizens against a marauding State, it came to be seen as a tool of oppression complicit in some of the egregious abuses in the country's darkest hour. What is more, complaints abounded of corruption and incompetence which were confirmed by a succession of probes and investigations which revealed a crumbling institution bereft of public confidence. Moreover, much ink has been split in many unflattering commentaries on judges and the judiciary.³⁰

It was not a surprise then that in remaking their Constitution, Kenyans resorted to a radical slew of measures intended to clean up the rot and save the institution from itself for themselves. Amongst the most dramatic of these measures were the requirements that the last Chief Justice of the old era vacate office within six months³¹ and the entire judiciary, namely all judges and magistrates, be subjected to a vetting process within a year to determine their suitability.³²

The re-constructionist ethic of the new dispensation informs this Chapter but its full wisdom and efficacy will have to await usage and time.

Unlike in former times when there was no discernible philosophy under-girding the exercise of judicial authority, the new Constitution states that in exercising judicial authority, the courts and tribunals should be guided by the following principles:³³

- (a) justice for all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation,

29 See, for instance, Abdullahi Ahmednasir's commentary in the cover story of *The Nairobi Law Monthly* Vol 1 Iss No 1 October 2010, continuing a familiar theme.

30 See, for instance, Abdullahi Ahmednasir's commentary in the cover story of *The Nairobi Law Monthly* Vol 1 Iss No 1 October 2010, continuing a familiar theme.

31 s 24 of the Sixth Schedule (Transitional and Consequential Provisions)

32 *Ibid*, s 23(1)

33 Art 159(2) of the Constitution.

The Courts

- arbitration and traditional dispute resolution mechanisms shall be promoted.³⁴
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of the Constitution shall be protected and promoted.

2.1.1 Independence of the Judiciary

In the exercise of judicial authority, the Judiciary is subject only to the Constitution and the law and not subject to the control or direction of any person or authority.³⁵ A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.³⁶

2.1.2 Jurisdiction

In Kenya, courts are established in a hierarchical fashion (*see figure 1* above), beginning with the Supreme Court at the apex, going all the way down to subordinate Courts, presided over by District magistrates with each court exercising such powers and possessing such competencies, collectively referred to as *jurisdiction*, as donated by various statutory provisions. Generally speaking, the powers and competencies both in terms of the territory and subject matter expand the higher a court sits in the hierarchy or pecking order.

Courts can only exercise such powers as are expressly given to them by law. Any purported arrogation of powers to itself that a court does not possess is an unlawful usurpation that is of no legal effect and amounts to a nullity. It matters not how high in the hierarchy a court lies or how willing the parties before it may be to submit to such pretended jurisdiction, it is all null. In the case of *Sir Ali Bin Salim v Shariff Mohamed Shatry*,³⁷ it was held that:

If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable; they are void and have no effect as estoppel or otherwise, and may not only be set aside at any time by any Court in which they are rendered, but be

34 *Ibid*, s Art 159(3). Traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights or repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or inconsistent with the Constitution or any written law

35 *Ibid*, s 160(1).

36 *Ibid*, s 160(5).

37 [1938] KLR 10, cited in the case of *Republic v Chairman, Lands Disputes Tribunal Kirinyaga District and another ex p Peter Maru Kariuki* [2005] eKLR (Misc Civil Appli 129 of 2004).

declared void by any Court in which they may be presented. It is well established by the law that jurisdiction cannot be formed by consent of the parties and any waiver on their part cannot make up for the lack or defect of the jurisdiction.

2.1.3 System of courts

Under the new Constitution, the system of courts is split in two; namely the superior courts and the subordinate courts. The superior courts comprise the Supreme Court, the Court of Appeal, the High Court and specialized courts, equal in status to the High Court, to be established by Parliament for the adjudication of dispute relating to employment and labour relations; and those relating to the environment and land with their respective jurisdictions.³⁸ On the other hand, subordinate courts are the Magistrates Courts, Kadhi's Courts, the Courts Martial and such other court or local tribunal as may be established by an Act of Parliament. The jurisdiction, functions and powers of subordinate courts shall be set out in legislation to be enacted by Parliament.³⁹

2.1.4 Supreme Court

At the very top of the Kenyan Court System is the Supreme Court, which is the senior most court and the judgments, directions and orders of which are, under the principle of judicial precedent, binding on all courts throughout the Republic except itself.⁴⁰

The Supreme Court consists of the Chief Justice, who shall be the president of the court; the Deputy Chief Justice and five other judges.⁴¹ A proper sitting of the Supreme Court comprises five judges.⁴² The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President and appellate jurisdiction to hear and determine appeals from the Court of Appeal; and any other court or tribunal as prescribed by national legislation.⁴³ Appeals lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved.⁴⁴

38 *Ibid*, art 162 of the Constitution.

39 *Ibid*, art 169

40 *Ibid*, art 163(7).

41 *Ibid*, art 163(1).

42 *Ibid*, art 163(2).

43 *Ibid*, art 163(3).

44 *Ibid*, art 163(4).

The Courts

A certification by the Court of Appeal on matters of general public importance may be reviewed by the Supreme Court and either affirmed, varied or overturned.⁴⁵

The Supreme Court may give an advisory opinion at the request of the national government, any State organ or any county government with respect to any matter concerning county government.⁴⁶

The Supreme Court may make rules for the exercise of its jurisdiction⁴⁷ and an Act of Parliament shall make further provision for its operation.⁴⁸

2.2 THE COURT OF APPEAL

This court is established under Article 164 of the Constitution as a superior court of record⁴⁹ having such jurisdiction and powers in relation to appeals from the High Court and otherwise as may be conferred to it by law. Under the same section, the judges of the Court of Appeal are of such number, not being less than twelve, as may be prescribed by Parliament.⁵⁰ There also exists a president of the Court of Appeal who is elected by the judges of the Court of Appeal from among themselves.⁵¹

The jurisdiction of the Court of Appeal is not unlimited. It has and can only exercise such jurisdiction and powers as established by an Act of Parliament, namely the Appellate Jurisdiction Act.⁵² The same is also governed by the Court of Appeal Rules. It has jurisdiction to hear and determine appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament.

On any appeal, the Court of Appeal has the power, as far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior Court (an expression referring to the High Court) with such directions as may be appropriate, to order a new trial and to make any necessary incidental or consequential orders including orders as to costs.⁵³

In the case of *Onyango v Republic*,⁵⁴ it was held that the jurisdiction of the

45 *Ibid*, art 163(5).

46 *Ibid*, art 163(6).

47 *Ibid*, art 163(8), Supreme Court Rules 2012.

48 *Ibid*, art 163(9), Supreme Court Act.

49 Article 163 of the Constitution.

50 *Ibid*, art 164(1)

51 *Ibid*, art 164(2)

52 Cap 9, Laws of Kenya.

53 *Ibid*, s 31.

54 [1983] eKLR (Criminal Appeal No. 91 of 1983).

Essentials of Criminal Procedure in Kenya

Court of Appeal of Kenya is derived from statute and the Court has no inherent jurisdiction. In the absence of any statutory provision conferring a right of appeal, such right could not be inferred from the repeal of a provision to the effect that no appeal shall lie from the High Court. The Court of Appeal refused to entertain a second appeal from the decision of a court martial since there was no statutory provision providing for the same.

Similarly, the Court of Appeal held in *Kariruki v Republic*⁵⁵ that it had no jurisdiction to hear an appeal against a refusal by the High Court to admit an appeal out of time. This is because there was no statutory provision donating any such powers.

For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred to it by the Appellate Jurisdiction Act, the Court of Appeal also has any other power, authority and Jurisdiction vested in the High Court.⁵⁶ This extends to both joinder of appeals and joinder of persons. Where two or more appeals are brought from convictions or sentences passed at the same trial they will be consolidated and proceed as one unless the Court otherwise orders. Where two or more persons convicted by a subordinate Court appealed to the Superior Court and their appeals were consolidated, their second appeals will be consolidated and proceed as one unless the Court otherwise orders or any two or more of them give notice to the Court against such proceedings.⁵⁷

In the hearing of the appeal, the law to be applied is the law applicable to the case in the High Court. Likewise any judgment thereof may be executed and enforced as if it were a judgment of the High Court.⁵⁸

A party to an appeal from a subordinate Court may appeal against the decision of the High Court in its appellate jurisdiction on a matter of law only. Severity of the sentence is a matter of fact. This was the holding in *Anthony Maneno v Republic*.⁵⁹ This provision does not apply to a decision of the High Court in its appellate jurisdiction or a refusal by the High Court to admit an appeal out of time, which are final.

55 [1984] KLR 809.

56 *Supra* nt 24, s 3(2).

57 s 59 of the Appellate Jurisdiction Act.

58 *Ibid*, ss 3(3) and 4.

59 [1993] eKLR (Criminal Appeal No. 46 of 1992).

It is worth noting that whereas the Court of Appeal's jurisdiction is in the main appellate, it does have original jurisdiction limited to the hearing and granting of applications for injunctions, stay of execution and other preservatory orders under rule 5(2)(b) pending the hearing of appeals. The Court may thus order the suspension of a sentence passed by the Superior Court or a subordinate court pending the hearing of appeals to it.

2.3 THE HIGH COURT:

The High Court is established under Article 165 of the Constitution as a superior court of record, vested with unlimited original jurisdiction in all civil and criminal matters, in addition to all other powers as may be conferred on it by the Constitution and any other laws. The Court of Appeal has in the *Delamere Case*⁶⁰ expressed its understanding of the High Court's unlimited original jurisdiction in the following terms:

The High Court, on the other hand can hear all matters without regard to territory or the subject matter in dispute. In criminal matters, it has jurisdiction to try the pettiest of offenders to the murderer. Likewise, in civil matters it has the jurisdiction to try a claim for the meanest amount without regard to the origin of the claim. Of course it does not normally do so; it would be overwhelmed by the sheer volume of work. But it has the jurisdiction to do so. That is our understanding of the phrase: '... unlimited original jurisdiction in civil or criminal matters...'

The presiding officers at the High Court are judges as prescribed by an Act of Parliament, which also makes provisions for the manner in which the High Court shall be organised and administered.⁶¹ In addition, there also exists the Principal Judge of the High Court, who is elected by the judges of the High Court from among themselves.⁶²

Enforcement Jurisdiction

Still on the Constitution, the High Court is possessed of a related but distinct jurisdiction namely the enforcement jurisdiction. This is donated by article 165(3) (b) of the Constitution which provides that it shall have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Such jurisdiction may be invoked by the subject-citizen or by another person or association acting on his behalf.⁶³

60 *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR

61 Art 165(1) of the Constitution.

62 *Ibid*, Art 165(2).

63 *Ibid*, art 22(2).

Essentials of Criminal Procedure in Kenya

The new Constitution mandates the Chief Justice to make rules to simplify access to justice under this jurisdiction by expanding on the rights of standing, minimization of formalities, non-payment of fees, reduction of procedural technicalities and the appearance of *amici curiae*.⁶⁴ The High Court may then grant appropriate relief including:⁶⁵

- i. a declaration of rights
- ii. an injunction;
- iii. a conservatory order;
- iv. a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights and is not justified under the Constitution;
- v. an order for compensation and
- vi. an order of judicial review.

In dealing with such allegations, the High Court has original jurisdiction to hear and determine an application made by any such person. Clearly the High Court is the predominant locus for the enforcement of the Bill of Rights. The Constitution contemplates, however that subordinate courts may also hear and determine applications or redress that are founded on the Bill of Rights. They can do so only in accordance with such original jurisdiction in cases designated as appropriate by Parliament.⁶⁶ It is expected that when the enabling legislation is enacted, it would provide for a right of appeal to the High Court.

The new enforcement scheme replaces the old one where if a question of such contravention of rights arose in proceedings in a subordinate court, the presiding officer would, on his own motion and must if any party to the proceedings so requests, refer the same to the High Court, which would render its decision on it in accordance with which the subordinate court would determine the matter. If, on the other hand, the subordinate court formed the opinion that the person raising the question of alleged contravention was being merely frivolous and vexatious, it would not make such reference.

In the case of *Anarita Karimi Njeru v Republic*,⁶⁷ it was stated (but may not now be the position) that if a person sought redress from the High Court on a matter which involved a reference to the Constitution, it was important (if only to ensure

64 *Ibid* sub-art 3

65 *Ibid*, art 23(3).

66 Art 23(2) of the Constitution.

67 [1980] 1 KLR 272.

The Courts

that justice is done to his case) that he should set out with reasonable degree of precision that of which he complained, the provisions said to be infringed, and the manner in which they are alleged to be infringed. Under the new order a much simpler and informal mode of approach is envisioned.

The power to promulgate the practise and procedure in relation to the High Court's enforcement jurisdiction is conferred upon the Chief Justice.⁶⁸ Paradoxically, even though the old Constitution had donated the same power to the Chief Justice, no rules existed in Kenya for nearly four decades since independence until Chief Justice Bernard Chunga made the first such rules in the year 2001⁶⁹ which were later replaced by the expanded *Gicheru Rule* which should apply transitionally pending new ones that satisfy the access to justice criteria of Article 22(3). Part III of the *Gicheru Rules*, in giving further effect to the enforcement Jurisdiction of the High Court, provides that an application may be made directly to the High Court where contravention of fundamental Rights and Freedoms is apprehended.⁷⁰ Such application is made by way of petition as set out in *Form D* of the Schedule,⁷¹ supported by affidavit⁷² and must, in criminal cases, be served upon the Attorney General within fourteen days of filing.⁷³

If a question of contravention of right arises within proceedings pending before a subordinate court, which question the presiding officer considers to be not frivolous or vexatious, he may refer it to the High Court in the prescribed form.⁷⁴

Where an allegation of contravention of rights is made by a party to proceedings that are pending in a subordinate court, he is required to apply informally to the presiding officer during the pendency of the said proceedings for a reference to be made to the High Court to determine the question of the alleged violation. Only when and where the presiding officer is satisfied that the allegation is meritorious and not frivolously or vexatiously made shall he grant the said application and frame the question for the High Court's determination.⁷⁵

68 Article 22(3) of the Constitution.

69 Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rs 2001, vide Legal Notice no 133 of 2001.

70 R 11 of the *Gicheru Rs*.

71 *Ibid*, r 12.

72 *Ibid* r 13.

73 *Ibid* r 15.

74 *Ibid*, Form E of the Schedule.

75 *Ibid*, r 26.

Essentials of Criminal Procedure in Kenya

Under the rules made by Chief Justice Chunga, the mere making of a reference on an application implicating a constitutional question of interpretation or violation led to an automatic stay of the proceedings before subordinate court pending the determination of the reference⁷⁶ by the High Court. This led to the stoppage of numerous criminal cases, especially those before the anti-corruption courts, which situation was clearly untenable. It is therefore not surprising that the *Gicheru Rules* subject any stoppage or stay of any further proceedings at the subordinate court to the exercise of judicial discretion on the part of a judge of the High Court upon application by a party pending the determination of the reference.⁷⁷

Even where a person exercises his right of direct access to the High Court under Rule 11, there being no pending proceeding before a subordinate court, though some may be contemplated or apprehended, conservatory or interim orders, which may include the prohibition of the institution or continuance of a criminal process, can only be given by a judge on application.⁷⁸

Even if the *Gicheru Rules* did not apply owing to the coming into force of the new Constitution, and even if a new Chief Justice were to fail in his duty to make rules, it has been expressly provided that such absence of rules does not limit the right of any person to commence court proceedings under Article 22 and to have the matter heard and determined by a court.⁷⁹

Appellate Jurisdiction

The High Court has appellate jurisdiction⁸⁰ but this is not unlimited. It exists only where provided for in statute.⁸¹ Thus a person convicted on a trial held by a subordinate Court of the first or second class may appeal to the High Court. The appeal may be on a matter of fact or law.⁸² No appeal is allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate Court, except as to the extent or legality of the sentence.⁸³

The State, through the Director of Public Prosecutions (formerly the Attorney General) has a right of appeal to the High Court against the acquittal of an accused

76 R 8 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the individual) High Court Practise and Procedure Rs 2001, vide Legal Notice No. 133 of 2001.

77 *Supra* nt 65, R. 29.

78 *Ibid*, r 20

79 Art 22(4) of the Constitution.

80 Art 165 (3)(e) of the Constitution

81 *Ibid*.

82 s 347 of the CPC.

83 *Ibid*, s 348.

The Courts

person by a subordinate court as well as an order by such court refusing to admit a complaint or formal charge or dismissing a charge as a matter of law.⁸⁴

In *Mwangi v Republic*,⁸⁵ the accused person was charged with the offence of robbery with violence and in the alternative, handling stolen property. He was convicted of the latter offence but acquitted of the charge of robbery with violence for lack of proof. He appealed against the decision of the trial court; and the first appellate court set aside the conviction on the alternative charge and substituted a conviction for robbery with violence. On second appeal, it was held that since there was no appeal by the Attorney General against the acquittal of the appellant, the first appellate court had no jurisdiction to alter the acquittal of the appellant for the formerly charged offence and to pass a sentence of death for it.

A new appellate jurisdiction is conferred upon the High Court for the hearing of appeals from a decision of any tribunal appointed under the Constitution to consider the removal of a person from office. This, however, does not extend to an appeal from the decision of a tribunal appointed to inquire into the President's physical or mental capacity to perform the functions of office under Article 144.

Interpretative Jurisdiction

The High Court has jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of:⁸⁶

- (i) the question whether any law is inconsistent with or contravenes the Constitution;
- (ii) the question whether anything done under the authority of the Constitution or any law is inconsistent with, or contravenes the Constitution;
- (iii) any matter relating to the constitutional powers of State organs over county governments and to the constitutional relationship between the levels of government; and;
- (iv) any question relating to conflict of laws

It is not any and every question or any and every allegation of constitutional interpretation that qualifies for reference to the High Court. Neither for that matter has the mere mention of the Constitution led to an automatic referral of the matter to the High Court. A question of constitutional interpretation was explained by Justice Apaloo as follows:⁸⁷

84 *Ibid*, s 348A.

85 [2005] KLR 371.

86 *Ibid*, art 165(3)(d)

87 See the case of *Odhiambo v Republic* (Civil Appeal No. 54 of 1989).

Essentials of Criminal Procedure in Kenya

My own conception of a constitutional issue when it relates to the interpretation of a provision of the constitution is that there are posed to the Court, two or more conflicting interpretations of the Constitution and the constitutional court is asked to pronounce on which is the correct one.

Where a question arises as to the interpretation of the Constitution in proceedings in a subordinate court and that court is of the opinion that the question involves a substantial question of law, that court may *suo moto*, and must if a party to the proceedings so requests, refer the question to the High Court. The High Court will then, in exercise of its interpretative jurisdiction deal with and determine that question in accordance with Part II of the *Gicheru Rules* and render its decision on the question referred to it in accordance with which the subordinate court will then dispose of the case before it.⁸⁸

Supervisory Jurisdiction

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. The Constitution expressly excludes superior courts⁸⁹ from the High Court's jurisdiction since it would be untenable for it to purport to supervise judicial bodies of concurrent or superior jurisdiction.

The operational rules currently in force in relation to the High Court's exercise of these supervisory jurisdiction and powers are the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practise and Procedure Rules 2006,⁹⁰ commonly referred to as the *Gicheru Rules*.

2.4 SUBORDINATE COURTS

The subordinate courts are:⁹¹

- (a) the Magistrates courts;
- (b) the Kadhis' courts;
- (c) the Courts Martial; and
- (d) any other court or local tribunal as may be established by an Act of Parliament,

88 Formerly required by s 67 of the old Constitution of Kenya but may still apply unless any of the anticipated legislation should otherwise provide.

89 Article 165(6) of the Constitution.

90 Legal Notice no 6 of 12 February 2006.

91 *Ibid*, art169(1) of the Constitution.

The Courts

other than the courts established for employment and labour relations; the environment and the use and occupation of, and title to, land.

Parliament has been vested with the power to enact legislation conferring jurisdiction, functions and powers on these subordinate courts.⁹²

Under the Magistrate's Court Act,⁹³ the Resident Magistrate's Court has jurisdiction throughout Kenya.⁹⁴ It exercises power and jurisdiction in criminal proceedings as conferred on it by the Criminal Procedure Code or any other written law. A Resident Magistrate's Court is presided over by magistrates of various ranks starting from a Resident Magistrate all the way to the Chief Magistrate, which is the highest rank in the magistracy.

A District Magistrates Court exercises power and jurisdiction over any such class of cases⁹⁵ designated by the Judicial Service Commission. It has jurisdiction throughout the district in which it is established. The Chief Justice may also extend the jurisdiction of this Court by notice in the Kenya Gazette.

The decision of a District Magistrate class II is amenable to appeal and reversal by a Resident Magistrate as happened in the case of *Republic v Jotham Njoroge Kimani*,⁹⁶ where a District Magistrate of the II Class had imposed a sentence of 7 years in excess of his jurisdiction that allowed imprisonment for a term not exceeding two years. This was termed illegal and the sentence was revised to two years of imprisonment by the Resident Magistrate.⁹⁷

In the First Schedule to the Criminal Procedure Code, is indicated the rank of the presiding officers of the magistrates courts that have jurisdiction to try specific offences under the Penal Code.⁹⁸

In exercise of the criminal jurisdiction, the controlling statute is the Criminal Procedure Code. The same states that all offences stipulated in the Penal Code and all other laws can be tried by the High Court or a subordinate Court.⁹⁹ Such offence is indicated in the fifth column of the First Schedule of the aforesaid Act.

92 *Ibid*, s 169 (2)

93 Cap 10 Laws of Kenya.

94 s 3(2) of the Magistrate's Court Act.

95 *Ibid*, s 6.

96 [2005] eKLR (Revision 4 of 2005).

97 See also *Kuvua v Republic* [2005] 2 KLR 156.

98 Cap 63 Laws of Kenya.

99 s 4 of the CPC.

Essentials of Criminal Procedure in Kenya

It goes on to say that an offence under any law other than the Penal Code shall be tried by such court as may be mentioned in that law. Where no court is mentioned, however, the same may be tried by the High Court or by a subordinate court by which such offence may be tried in accordance with the fifth column of the Criminal Procedure Code.¹⁰⁰ Unlike the High Court which may pass any sentence authorized by law¹⁰¹ for a criminal offence, the kind of sentence that may be imposed by a subordinate court depends on the class or rank of the officer presiding; the same rising in severity, in terms of the full sentence of imprisonment, in proportion to the seniority of the presiding officer.¹⁰²

The Judicial Service Commission may, by notice in the Gazette, extend the sentencing jurisdiction either generally or in relation to particular offences.¹⁰³ Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass without offending its jurisdictional limitations.¹⁰⁴ The same also applies in the case of imposition of consecutive sentences notwithstanding that the aggregate punishment for the several offences may exceed the sentence that the court is competent to impose so long as such aggregation does not exceed 14 years imprisonment or double the usual length limit of that court.¹⁰⁵

Section 5 of the same indicates that where other offences not provided by the Penal code are committed, they may be tried by the High Court or any such subordinate Court stipulated by the fifth column of the First Schedule to the Criminal Procedure Code, if not by the statute creating the offence.

Beyond the power to try is the power to sentence, authorized by law.¹⁰⁶ Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.

100 *Ibid*, s 5.

101 *Ibid*, s 6.

102 *Ibid*, s 7.

103 *Ibid*, s 8.

104 *Ibid*, s 12.

105 *Ibid*, s 14.

106 *Ibid*, s 6.

CHAPTER THREE

SEARCHES

An important tool in the prevention, investigation and detection of crime and the collection and gathering of evidence to be presented in a court of law in proof of the commission of an offence is the *search*. A *search* is an attempt to find something; it is the careful examination to find hidden items.¹⁰⁷ It is indisputably a useful aid to the criminal justice process.

There are two types of searches recognized in law:

- a. Search with a Warrant
- b. Search without a Warrant

3.1 SEARCHES WITH A WARRANT

A *search warrant* is a written permit, issued by a Court or a magistrate allowing a search upon proof on oath that a thing on, with or in respect of which an offence has been committed or which may be necessary for the investigation of an offence needs to be seized and taken before a court to be dealt with according to law. It authorizes a police officer or a person named within it to search a place, building, ship, aircraft, vehicle, box or receptacle for the purposes of conducting an investigation or obtaining evidence.¹⁰⁸

A police officer may lay any lawful complaint before a magistrate and may apply for a search warrant as may lawfully be issued against any person.¹⁰⁹

The contents of the search warrant are:¹¹⁰

- a) The offence with which the person, place or thing being searched is related
- b) The name or description of the person, place or thing being searched
- c) The person(s) to execute the search warrant
- d) An order directed to the executor of the warrant to seize the products of the search and produce them in the Court issuing the warrant or any other Court with jurisdiction, to be dealt with in accordance with the law.

The warrant remains in force until it is executed or until it is cancelled by the court which issued it.¹¹¹ A search warrant may be directed to one or more police

107 Macmillan English Dictionary, International Students' Edition- 2006.

108 s 118 of the CPC.

109 s 19 of the Police Act (Cap 84 Laws of Kenya).

110 s 122 read together with s 102 of the CPC

111 s 122 (3) of the CPC.

Essentials of Criminal Procedure in Kenya

officers and to all other police officers of the area within which the court has jurisdiction. The court may also direct that the warrant, where it is necessary to be executed immediately, be so executed by any other person where no police officer is immediately available.¹¹² A warrant directed to a police officer may also be executed by another officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.¹¹³ The warrant may be executed at any place in Kenya at any time between sunrise and sunset on any day, including Sundays or at any time the court authorizes.¹¹⁴

A person who owns or resides in a building or place liable to search must allow the executor of the warrant free ingress and egress and afford all reasonable facilities for a search therein. The police officer on his part must produce the search warrant that validates his entry into the building being searched. The police officer may break open any outer or inner door or window of a building, where ingress or egress cannot be so obtained.¹¹⁵

The conduct of searches consists a serious intrusion upon the privacy and property of a citizen. The English judge, Lord Denning, in the case of *Chic Fashions (West Wales) Ltd. v Jones*¹¹⁶ first asserted that every man's house is his castle, meaning that a constable (policeman) is never in principle allowed to enter and search a man's house. However, there were certain exceptions to this rule. He stated:

[N]o man's house is to be used as a hiding place for thieves or receptacle for stolen goods. If there is reasonable ground for believing that there are stolen goods in the house, information can be laid before a magistrate on oath and the magistrate can then issue a warrant authorizing a constable to enter the house and seize the goods.

The privacy of one's person and home is a fundamental right¹¹⁷ which should be upheld by all jurisdictions purporting to practise the rule of law as opposed to that of men. Under the Constitution, every person has the right to privacy, which includes the right not to have:

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.

112 *Ibid*, s 122 read together with s 104.

113 *Ibid*, s 106 read together with s 122.

114 *Ibid*, s 119, 109 read together with s 122.

115 *Ibid*, s 120 (1), (2)- read with s 22.

116 [1968] 2 QB 299.

117 Art. 31 of the Constitution of Kenya.

Searches

However, this right is not absolute.¹¹⁸ The law provides for instances where the said right, in the interest of public safety and public order may be limited.¹¹⁹ The law indeed provides for the use of search warrants, which in reality, amount to a judicial certification of derogation to an individual's right to privacy. As is the nature of criminal litigation, a balance is sought to be struck between individual rights and those of the society. Under the Constitution,¹²⁰ a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

For this reason, the power to issue search warrants is vested only in the court or the magistrate. The invasion of an individual's privacy, no matter how well intentioned, is not left to the unrestricted whim of the police or other investigative agencies. They must seek permission from court and the court will not issue search warrants upon presumptions only. The police must state on oath the basis upon which they seek the warrant, which is that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is or is reasonably suspected to be in the possession of somebody or somewhere.

Whereas in practice the courts do not insist on too high a threshold of proof before issuing search warrants, there must at least be a reasonable basis for the same. This judicial thinking is reflected in the case of *Vitu Ltd v The Chief Magistrate at Nairobi and 2 others*,¹²¹ where Osiemo J. held that it is expected that when a police officer or any other investigator approaches the Court for a warrant, he must show reasonable suspicion of an offence being about to be committed or having been committed.

118 See art 24 and 25 of the Constitution

119 *Ibid*, s 24

120 *Ibid*, ss1

121 H C Misc Application no 475 of 2004.

Essentials of Criminal Procedure in Kenya

Where a police officer enters a house with a search warrant, he may not only seize goods in respect of the warrant, but also any other goods which he believes on reasonable grounds to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him. This was the holding in the old English case of *Pringle v Bremner and Stirling*.¹²²

Addressing the necessary extension of the parameters of the search warrant so as to render it efficacious, Salmon L.J. posed, “If the man’s person is not sacrosanct in the eyes of the law, how can the goods which he is reasonably suspected of having stolen or received be sacrosanct?”

In *Crazier v Cundey*,¹²³ it was held that a constable could properly seize other goods not mentioned in the warrant if they afforded useful evidence to substantiate the charge for which the warrant was issued.

Previously, even where a search was conducted and it turned out that the same was misguided, the fruits of the search were nonetheless admitted as evidence in a Court of law. The test applied was that of admissibility. It mattered not how the evidence was obtained. Even if it was stolen, it was admissible as was stated by Crompton J of the Court of Queen’s Bench in *Reg v Leatham*,¹²⁴ which was quoted with approval in *Kuruma v The Queen*.¹²⁵

But that view was never unanimous as there is a different school of judicial thought that would exclude illegally or improperly obtained evidence, but it would seem to be superseded by the former. An example is *Hamis v Director of Public Prosecutions*,¹²⁶ where the Court held that admission of some piece of evidence obtained from an accused person by trick would be, “no doubt”, ruled out by a judge. This view has received constitutional backing with the enactment of Article 50(4) which provides for the exclusion of any evidence obtained in a manner violative of any right or fundamental freedom in the Bill of Rights. It would seem, though, that the Constitution does not envisage an absolute bar to such evidence. It is left to the discretion of the court to suppress it if its admission would render the trial unfair or detrimental to the administration of justice.

122 [1867] 5 Macph. 55.

123 108 E.R. 49.

124 [1861] Cox C.C. 498.

125 [1954] Court of Appeal of East Africa.

126 [1952] AC 694.

Searches on a Person

A person may be searched upon reasonable suspicion of concealing about his person an article for which search should be made. If that person is a woman, the search must be made by another woman with strict regard to decency.¹²⁷

Although there is a paucity of judicial authority on this point, the proper position must be that personal searches, by the mere fact that they involve an intrusion upon the person and therefore likely to be humiliating and demeaning. Full body searches by way of pat downs or the insertion of fingers and other objects to retrieve drugs amply attest to this. To be legal then, such searches ought to be conducted only where there is reasonable or probable cause. This must be so for, if a person's house be his castle, surely his body must be, at the very least, his temple or shrine, not lightly to be desecrated.

The Evidence Act¹²⁸ also contains provisions in aid of investigations. Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may, by warrant authorize a police officer or another person named therein to investigate the account of any specified person in any banker's book. Such warrant is sufficient authority for the production of any banker's book as may be required for scrutiny by the officer or person named in the warrant. The officer may take copies of any relevant entry or matter in such banker's book.¹²⁹ However, a banker is not bound to disclose the status of a customer's account except on reasonable and proper grounds such as where the disclosure is under compulsion by law or there is a duty to disclose or where the interest of the bank requires the disclosure or the disclosure is made by the express or implied consent of the customer. This was the holding of the High Court in *Erastus Kibiti Stephen v Euro Bank Ltd. and another*.¹³⁰

3.2 PROFESSIONAL PRIVILEGE

A search, even with a warrant, may not be directed towards material which cannot be legally seized. Such includes correspondence between an accused person and his spouse, lawyers and doctors. This applies to documents which are in the possession

127 *Ibid*, s 120(4) read together with s 27.

128 Cap 80 Laws of Kenya.

129 s 180(1) of the Evidence Act (Cap 80).

130 [2003] eKLR (Miscellaneous Criminal Application No. 9 of 2002).

Essentials of Criminal Procedure in Kenya

of the person himself and not a suspect or a third party. The reason is that such persons have a right to refuse to produce the documents because they are privileged. The right is lost if the person is suspected to have participated in a criminal act. This means that a lawyer's files can be searched and examined if he is party to the criminal acts. Consent is another waiver to this rule.

In the case of *Frank Truman Export Ltd and others v Metropolitan Police Commissioner*,¹³¹ the learned judge sought to balance between public policy and professional privilege in the exercise of a discretionary remedy on the facts and circumstances of the particular case. The matter in question dealt with the acquisition of documents by the police and which were claimed to have been privileged. A search warrant existed, execution of which involved searching and sorting which was consented to by the solicitor. On the other hand, although the police were entitled to search and sort, some of the documents they found were in the hands of an innocent bailee and were privileged until handed over. A question arose whether in such circumstances and in the interest of public policy the police were entitled to retain them and use them as evidence in prosecution of the crime which was already alleged at the time of finding the documents and charged before there was time to sort them or not. Swanwick J. held that on the balance they were.

Where anything from the search has been seized and brought before a Court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.¹³² It may further be detained for the purposes of an appeal or the trial. If no appeal is made or if no person is committed for trial, the Court directs the thing be restored to the person from whom it was taken unless the Court deems fit or is authorized or required by law to dispose of it otherwise.¹³³

The judicial justification of this is found in the old English case of *Dillon v O'Brien and Davis*,¹³⁴ where Palles C.B. said:

The interest of the State in the person being brought to trial in due course necessarily extends to the preservation of material evidence of his guilt or his innocence, as well as to his custody for the trial. His custody is of no value if the law is powerless to prevent the abstraction and destruction of the evidence, without which a trial would be no more than an empty form.

131 [1976 no. 2445].

132 s 121 of the CPC.

133 *Ibid.*

134 [1887] 16 Cox C C 245.

Searches

Lord Denning, in the case of *Ghani v Jones*,¹³⁵ suggested a list of requirements or criteria to justify the taking of an article by the police and retaining thereof, under a search warrant:

1. Reasonable ground to believe that a serious offence has been committed (or is about to be committed)
2. Reasonable ground to believe that the article taken is the fruit of crime, instrument by which crime was committed or material evidence to prove the commission of a crime.
3. Reasonable ground to believe that the person in possession of it is involved in the crime or at any rate his refusal to hand it over is unreasonable

He further stated that the article must be kept for no longer than necessary for the purpose of investigation and evidence; and in the case of a document if a copy will suffice, the original should be returned. The lawfulness of the police conduct must be judged at the time. Moreover, the seizure must be justified at the time, irrespective of whether the case goes to Court or not. It cannot be rendered unlawful by subsequent events.

Due to the prior judicial permit, evidence obtained by a search warrant is more readily admitted by Courts than that obtained without a warrant. Furthermore, the officer is protected from any civil liability arising therefrom.¹³⁶ In the case of *Pascal Nkala Tubulav Republic*,¹³⁷ the Court quashed a conviction where the appellant's house had been searched; but it had not been shown whether the search was with a warrant or not. Moreover, there was no other person in the house being searched except the police officers conducting the search. The Court held that the way the search was conducted rendered it of no evidential value regardless of whatever was alleged to have been found.¹³⁸

3.3 CAN A SEARCH WARRANT BE USED MORE THAN ONCE?

In *Butler v Board of Trade*,¹³⁹ Goff J. Expressed himself succinctly:

There is no express limitation of time for which a warrant remains in force; and the only restriction upon the power of search is that it must be executed between sunrise and sunset- during the day time. Parliament did not intend such warrant to subject the owner to an unlimited number of searches throughout an unlimited period of time. It was construed that a warrant only authorizes a single entry, search and seizure.

135 [1907] 1 QB 693.

136 Lyman M D Practical Drug Enforcement (second ed Geberth CRC Press 2001).

137 [1998] eKLR (High Court Criminal Appeal No. 82 of 1992).

138 see also *Evans Kanai Karanja v Republic* [2002] eKLR (Criminal Application No. 24 of 2001).

139 [1971] Ch 680.

Essentials of Criminal Procedure in Kenya

After that entry, search and seizure, the warrant is excluded and spent and a second warrant must be obtained to authorize a second entry.

Furthermore, it has been held that there is no restriction upon the evidence which may be adduced to prove the offence or upon the procedure for obtaining such evidence. There is nothing to suggest that strict compliance with the procedure is a necessary condition for conviction. Consequently, if the Court in the exercise of its discretion excluded such evidence, such conclusions would be contrary to law.

Where the defence to any suit instituted against an officer is that the act complained of was done in obedience to a warrant purporting to be issued by a court, the Court shall, upon production of the warrant, accept that warrant as prima facie evidence of the due making thereof and, upon proof that the act complained of was done in obedience to that warrant, enter judgment in favour of such officer. No proof of the signature upon such warrant shall be required unless the Court has reason to doubt its genuineness, and, where such signature is proved not to be genuine, the Court shall nevertheless enter judgment in favour of the officer if it is satisfied that, at the time of the act complained of, such officer believed on reasonable grounds, that the signature was genuine.¹⁴⁰

3.4 SEARCHES WITHOUT A WARRANT

A police officer or other persons authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained, may be found; or where there is reason to suspect that it has been used or employed in the commission, or to facilitate the commission of an offence.¹⁴¹ Any stop, search and detention thereof should be conducted by an authorized person; contrary to which an accused may be acquitted. This was the holding in the case of *Atibu Juma v Republic*.¹⁴²

A police officer as well as an administration police officer may also search any person for whom a warrant of arrest has been issued or who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained or of being guilty of a cognizable offence.¹⁴³

¹⁴⁰ s 16 of the Administration Police Act (Cap 85).

¹⁴¹ s 26 of the CPC.

¹⁴² [1983] eKLR. (Criminal Appeal No. 898 of 1982).

¹⁴³ s 10(1)(b) of the Administration Police Act Cap 85 Laws of Kenya.

Searches

Where a person in authority over certain goods or a place to be searched gives consent to a search, a police officer may search such place without a warrant. The police officer is under no duty to tell the person being searched that he may refuse to be searched. It would also appear that if the consent to search is procured by trickery, the ensuing search is not thereby invalidated.

If an administration police officer reasonably suspects that a person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of being guilty of a cognizable offence, is in any premises, he may demand that the person residing in or being in charge of such premises allow him free ingress thereto and afford him all reasonable facilities for a search therein. Where, notwithstanding notification of his authority and purpose, ingress cannot without unreasonable delay be so obtained, the officer may without warrant, enter such premises and search therein, and may, if necessary in order to effect such entry, break open any outer or inner door or window or other part of such premises.¹⁴⁴

The same 'delay principle' would apply in matters where the search requires a warrant but any delay would defeat the purpose of the warrant since evidence would have been destroyed or relocated elsewhere.¹⁴⁵ Such would also be the case where there is any danger the goods to be searched would pose to the public. In these circumstances, it is reasonable and permissible to conduct a search without a warrant.

An officer may stop, search and detain any vehicle or vessel which he has reasonable cause to suspect is being employed in the commission of, or to facilitate the commission of an offence absent a warrant¹⁴⁶ and may also stop and search any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

A search incidental to an arrest may be conducted without a prior warrant whenever a person is arrested with or without a warrant by the police officer making the arrest, or, the police officer to whom a person arrested by someone else is handed over. He may then place in safe custody all articles other than necessary wearing apparel, found upon such person.¹⁴⁷

144 *Ibid*, s 10(1)(b) See also s 29 of the CPC.

145 s 10(1)(a) of the Administration Police Act (Cap 85).

146 *Ibid*, s 10(2).

147 s 25 of the CPC.

CHAPTER FOUR

ARRESTS

As it is in the nature of persons who have committed or are suspected of having committed offences to seek to elude the criminal process by which they may be adjudged guilty and punished accordingly, a lawful mechanism has to exist by which such persons may be apprehended, restrained and brought before court to be dealt with in accordance with the law. That mechanism is arrest. An *arrest* is a restraint upon a person's liberty and may take the form of physical confinement.

4.1 GENERAL PROVISIONS RELATING TO ARRESTS

In making an arrest, the policeman or any person effecting the arrest may touch or confine the body of the person being arrested, unless the person being arrested voluntarily submits to custody by word or action. Where a person forcibly resists the endeavour to arrest him or attempts to evade the arrest, the person effecting the arrest may use all means necessary to effect the arrest. The force applied to effect the arrest or to counter any attempt to resist apprehension must, however, be reasonable.¹⁴⁸

In essence, therefore, the person effecting an arrest:

- i. May but need not touch the person to be arrested
- ii. May use all means necessary to effect the arrest, including reasonable force

Pursuant to a warrant, the person effecting an arrest may enter any place where the person to be arrested is hiding or is reasonably suspected to have entered and concealed himself and demand that the occupiers of that house allow him free ingress and reasonable facilities for the search.¹⁴⁹

Where ingress is not possible, a police officer is at liberty to immediately break open any outer or inner door or window of a house or a place to effect entry¹⁵⁰ so long as he has a warrant. Even without a warrant, he may still so break so as to pre-empt the escape of the person that would be afforded by delay in obtaining a warrant. Similarly, the person effecting an arrest is authorized to break out of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.¹⁵¹ The breaking action is only valid where the person effecting an arrest:

148 s 21 of the CPC, See also the case of *Waweru v Republic* [1982] KLR 137.

149 *Supra* nt 110, s 22(1) of the CPC.

150 *Ibid*, s 22(2)(1).

151 *Ibid*, s 23.

Essentials of Criminal Procedure in Kenya

- i. Has made notification of his entry
- ii. Has stated his purpose
- iii. Has made demand of admittance
- IV. Has been denied or is otherwise unable to gain admittance¹⁵²

Where the place is an apartment in the actual occupancy of a woman who, according to custom, does not appear in public, the person effecting an arrest must, before entering those premises, give notice to the woman to withdraw and must afford her every reasonable facility for withdrawing; whereupon he may break open the apartment and enter it.¹⁵³

The person arrested should not be subjected to more restraint than is necessary to prevent his escape.¹⁵⁴

The person effecting an arrest is at liberty to search the person being arrested and place into safe custody all articles, other than the necessary wearing apparel they have on them.¹⁵⁵

A police officer or any other person authorized in writing by the Commissioner of Police may stop, search and detain any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or is reasonably suspected to have been used or employed in the commission or to facilitate the commission of an offence. He may do the same to any person reasonably suspected of having in his possession or conveying anything stolen or unlawfully obtained.¹⁵⁶

The State is fully immunized from liability for any loss or damage suffered by any person by reason of the detention of any aircraft, vessel or vehicle under the foregoing circumstances as such person is not entitled to damages or compensation.¹⁵⁷

As the body search of a person on arrest involves an intimate intrusion with great potential for indecency, section 27 of the Code prescribes that when a police officer needs to search a woman, he has to ensure that the search is carried out by another woman, with strict regard to decency. It would seem the law presupposes that there is nothing objectionable about a police woman conducting a body

¹⁵² *Ibid*, s 22(2)(1).

¹⁵³ *Ibid*, s 22(2).

¹⁵⁴ *Ibid*, s 24.

¹⁵⁵ *Ibid*, s 25.

¹⁵⁶ *Ibid*, s 26(1) &(2).

¹⁵⁷ *Ibid*, s 26 (2).

Arrests

search on a man, which is highly a debatable point. The requirement for strict regard to decency ought to cut across the board for it is possible for a person to be indecent while conducting a search on one of his or her gender.

In case a search uncovers offensive weapons concealed about the person being arrested, the police officer shall deliver them to the court or the officer before which or whom the officer or person making the arrest is required by law to produce the person arrested.¹⁵⁸

Arrests may be of two kinds:

- a) Arrests without a warrant
- b) Arrests with a warrant

a) Arrests without a warrant

There are instances when an arrest may be lawfully effected without a Court order or direction. They include the apprehension of persons who:¹⁵⁹

- i. Commit or are suspected to have committed cognizable offences, namely offences for which no warrant is needed in order for an arrest to be effected.¹⁶⁰
In *Republic v Hussen*,¹⁶¹ murder was held to be *cognizable offence*, hence a police officer could arrest without a warrant.
- ii. Commit a breach of the peace in the presence of a police officer.
- iii. Obstruct a police officer in the execution of his duty.
- iv. Escaped or attempt to escape from lawful custody
- v. Are in possession of anything suspected to have been stolen or are reasonably suspected of having committed an offence in respect of that thing.
- vi. Are reasonably suspected of being deserters from the armed forces
- vii. Are found in a highway, yard or other place during the night and who are reasonably suspected of having committed or being about to commit a felony
- viii. Are found in a street or public place nocturnally and are reasonably suspected of being there for an illegal or disorderly purpose or who are unable to give a satisfactory account of themselves
- ix. Are reasonably suspected of having committed extraditable offences outside Kenya
- x. Are in procession of implements of house breaking for which they are unable to provide a lawful excuse.
- xi. Are reasonably suspected to be the subjects of a warrant of arrest.

158 s 28 of the CPC.

159 *Ibid*, s 29.

160 *Ibid*, s 2.

161 [1990] KLR 497.

Essentials of Criminal Procedure in Kenya

It is clear from the aforesaid provisions that a police officer is entitled to effect an arrest without a warrant, so long as he has reasonable grounds for entertaining the suspicion at that material time. Subsequent events may show that the officer was in error at the time but the arrest will not thereby be rendered unlawful. This has been the law for more than a century as may be seen from the sentiments of Lord Diplock in *Dillon v O' Brien and Davis*,¹⁶² “*In the case of an arrest, reasonable grounds for belief in guilt at the time of arrest are sufficient justification, though subsequent information or events may show those grounds to be deceptive.*”

An Officer in charge of a police station may also arrest or cause to be arrested without the requirement of a warrant any suspicious *self-concealers*; being persons found within the limits of the station in circumstances suggestive that they are taking precautions to conceal their presence with a view to committing a cognizable offence.¹⁶³

In case the officer requires a subordinate to effect that arrest otherwise than in his presence, he shall do so by order in writing specifying the person to be arrested and the offence or other cause for which he is to be arrested.¹⁶⁴

A person who has committed or is suspected to have committed a non-cognizable offence may still be arrested without a warrant if he, when asked, refuses to give details of his name and place of residence; or gives a name or residence which the officer has reason to believe to be false. Such a person may be arrested until such information is ascertained whereupon he shall be released with or without condition to appear before a magistrate if so required. Where the person is a non-resident of Kenya, his release is upon bond being secured by a surety or sureties resident in Kenya. If such information is not ascertained he must be arraigned in Court within a reasonable time.¹⁶⁵

The police officer who arrests without a warrant must, without any un-necessary delay, and subject to the provisions of bail in the Criminal Procedure Code, take or send the person arrested before a magistrate having jurisdiction in the case or before an officer in charge of a police station.¹⁶⁶

A private person can arrest one who commits a cognizable offence or one he reasonably suspects to have committed a felony. This is a citizen's arrest. Another instance is where damage to property has been committed and the owner of the

¹⁶² [1887] 16 Cox CC 245.

¹⁶³ s 30 of the CPC.

¹⁶⁴ *Ibid*, s 31.

¹⁶⁵ *Ibid*, s 32.

¹⁶⁶ *Supra* nt 127, s 33 of the CPC.

Arrests

property or his servants or any other person he authorizes may arrest the offender.¹⁶⁷ The private person needs then to expeditiously take over the person being arrested to a police officer or, in the absence of a police officer, he must take that person to a police station for the person to be re-arrested. The police officer may release the person arrested where he deems that no offence has been committed.¹⁶⁸

Where a person has been taken into custody without a warrant for an offence, the officer in charge of the police station to which the person has been brought, may release the person upon execution of a bond of a reasonable amount, with or without sureties to appear before a magistrate at a future date.¹⁶⁹ However, this is subject to certain conditions:

1. That the offence is not of a capital nature
2. It is not practicable to bring the person arrested before an appropriate subordinate Court within twenty-four hours after he has been taken into custody
3. The offence itself is not of a serious nature.

The officer in charge of a police station may also release a person arrested on suspicion of having committed an offence, when, after due police inquiry, he forms the opinion that there is insufficient evidence disclosed on which to proceed with the charge.¹⁷⁰

The officers in charge of police stations are under obligation to report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations; whether those persons have been admitted to bail or not.¹⁷¹ These apprehension reports are intended to curtail arbitrary arrest and detention of persons by police officers in that they afford courts the opportunity to know, and make further inquiries and issue directions respecting the circumstances under which citizens within their jurisdiction have been deprived of their personal liberty.

A magistrate has power to personally arrest or order the arrest of any person who commits an offence in his presence within the local limits of his jurisdiction whereupon he may commit the offender to custody unless he admits the offender to bail. He may similarly arrest or direct the arrest in his presence within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant. In both of these instances the arrest is without a warrant.¹⁷²

¹⁶⁷ *Ibid*, s 34.

¹⁶⁸ *Ibid*, s 35.

¹⁶⁹ *Ibid*, s 36.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*, s 37.

¹⁷² s 39 of the CPC.

If a person escapes or is rescued from lawful custody, the person who had apprehended him, whether or not he be a police officer and whether or not he has a warrant, is entitled to pursue and arrest him without a warrant and may, moreover, break into any house or place so as to seize to recapture and re-take him.¹⁷³

There is a positive duty on all persons to assist police officers or magistrates who require their aid in taking or preventing someone from escaping and in suppressing any breach of the peace or any attempt at committing any injury to a railway, canal or any other public property.¹⁷⁴

b) Arrests With a Warrant

Section 100 of the Criminal Procedure Code states that if summons have been issued directed at a person against whom an accusation has been laid, the Court may, before or after the time of hearing, issue a warrant of arrest against the person so summoned. If the accused does not appear at the time and place appointed in and by the summons, and his personal attendance has not been dispensed with, the Court may issue a warrant to apprehend him and cause him to be brought before it but no warrant is issued unless a complaint has been made upon oath.¹⁷⁵

The court may also issue a warrant for the arrest of a person who fails to appear when required even for the mention of his case as happened in the case of *Abdi Hakim Alsafa v Republic*.¹⁷⁶

An *arrest warrant* is a written order issued by a magistrate for the apprehension of a person who fails to appear in Court at an appointed time and in relation to an offence committed by him or for witnesses who fail to appear in Court to give evidence. Warrants of arrest are issued by Court for witnesses who are bonded but fail to turn up to give evidence and for those accused persons who have jumped bail or have absconded.¹⁷⁷ They are directed to a police officer or any other person who will effect the arrest.

In obtaining a warrant of arrest, the police lay written information before the magistrate and on oath that a person has or is suspected of having committed an offence.¹⁷⁸ Issuance of warrants involves the exercise of judicial discretion. As such, a warrant of arrest should not be issued unless the offence in question is indictable or is punishable with imprisonment. Further, the court ought to be satisfied that

173 *Ibid*, s 40 read together with s 41.

174 *Ibid*, s 42.

175 *Ibid*, s 101.

176 [2007] eKLR (Miscellaneous Criminal Application No. 301 of 2007).

177 *Global Enterprises (PVT) Ltd v Robinson Malambo and another* [2006] eKLR (Civil Case No. 53 of 2006).

178 s 100 of the CPC.

the person named in the warrant would not voluntarily appear in attendance, as required, hence the necessity of the warrant.

4.2 VALIDITY OF WARRANTS¹⁷⁹

The formal validity of a warrant is satisfied when the warrant meets the following requirements: Every warrant:

- i. Must bear the signature of the judge or magistrate issuing it
- ii. Must bear the seal of the Court
- iii. Must bear the name of the person or persons to whom it is directed
- iv. Must bear a *précis* of the offence with which the person against whom it is issued is charged
- v. Must bear the name or description of the person to be apprehended (the subject)
- vi. Must order the person or persons to whom it is directed to apprehend the subject for the purpose of bringing him before the Court issuing the warrant; or before some other Court having jurisdiction in the case, to answer to the charge therein mentioned and to be dealt with further in accordance with the law.

The warrant remains in effect until it has been executed, lifted or cancelled by the officer of the law or the Court that issued it.¹⁸⁰

If the court issuing the warrant so directs by endorsement on the warrant, the subject thereof may be released if he executes a bond with sufficient sureties for his attendance before it at a subsequent specified time and thereafter until otherwise directed by the court. This, however, does not apply to the offences of murder, treason or rape as per the statute, though it ought properly to exclude the exact list of the usual non- bailable offences.¹⁸¹

The endorsement must state:

- a) The number of sureties
- b) The amount in which they and the subject are to be bound
- c) The time at which the subject is to attend before Court

The officer to whom the warrant is directed must forward the bond to the Court whenever security is thus taken.¹⁸²

Warrants of arrest are normally directed to a particular police officer or to

¹⁷⁹ *Ibid*, s 102.

¹⁸⁰ *Ibid*, s 102(3).

¹⁸¹ *Ibid*, s 103.

¹⁸² s 103 of the CPC.

Essentials of Criminal Procedure in Kenya

a particular group of officers. They may, however, be directed to any person or persons if immediate execution is necessary and no police officer is immediately available and such person or persons shall execute the same. The liability to execute a warrant is joint and several on the part of the persons to whom it is directed.¹⁸³

Where an escaped convict or a person accused of a cognizable offence has eluded pursuit, a magistrate may direct a warrant to a land holder, manager of land or farm manager who shall, on receipt of it, acknowledge it in writing and execute it if the subject enters upon his land or farm. The subject is then to be taken over with the warrant to the nearest police officer, who shall cause him to be taken before a magistrate unless the subject gives security.¹⁸⁴

A warrant directed at a police officer is transferrable for execution to another officer provided the officer, to whom it is directed or endorsed, endorses it to the next officer.¹⁸⁵ The officer or other person who finally executes a warrant is under a duty to notify the subject of the substance of the warrant and show him the warrant should the subject so require¹⁸⁶ and shall then arrest and expeditiously bring the subject before the Court to which he is required to produce him.¹⁸⁷

A warrant of arrest may be executed at any place in Kenya.¹⁸⁸ Where it is to be executed outside the local limits of jurisdiction of the issuing court that court may forward it by post or otherwise to a magistrate in whose local limits of jurisdiction it is to be executed. The receiving magistrate will then endorse it and cause it to be executed as if he issued it himself.¹⁸⁹

Where a police officer receives a warrant directing him to execute it outside the local limits of his jurisdiction, he must take it to the magistrate in whose jurisdiction it is to be executed. This latter magistrate endorses his name on the warrant, which then constitutes sufficient authority for the police officer to execute it within those local limits and for the local police to afford him all the assistance he may need in executing it. The officer may, however, execute it without such endorsement if he has reason to believe that any delay may lead to the frustration or defeat of the execution of the warrant.¹⁹⁰

183 *Ibid*, s 104.

184 *Ibid*, s 105.

185 *Ibid*, s 106.

186 *Ibid*, s 107.

187 *Ibid*, s 108.

188 *Ibid*, s 109.

189 *Ibid*, s 110.

190 *Ibid*, s 111.

Once a person is arrested outside the local jurisdiction limits of the court that issued the warrant, he shall be taken before a magistrate in the locality where he was arrested unless the court that issued the warrant is within twenty miles of the place of arrest or is closer than the local court.¹⁹¹ The magistrate having jurisdiction over the locality of arrest shall then satisfy himself that the person arrested is the subject of the warrant and shall direct his removal in custody to the court that issued the warrant unless the subject gives security in an appropriate case.¹⁹²

4.3 IRREGULARITIES AND DEFECTS IN A WARRANT¹⁹³

Under the Criminal Procedure Code, any irregularities or defects in a warrant, be they in form or substance, as well as any variance between it and a written complaint, or between the warrant, the complaint and the prosecution evidence at the trial, do not vitiate or otherwise affect the validity of any proceedings at or subsequent to the hearing of the case. This has been given judicial endorsement in, *inter alia*, the case of *James Maina Njuguna v Republic*,¹⁹⁴ where an appeal on the ground that the mode of arrest had no nexus to the crime or any sound link connecting the appellant to the crime was rejected with the Court going further to say that the evidence adduced was consistent with the warrant.¹⁹⁵

If it appears to the court that the variance is such that the accused has been thereby deceived or misled, it may merely adjourn the hearing of the case to some future date but will not nullify or stop the proceedings.

4.4 CAN A WARRANT OF ARREST BE USED MORE THAN ONCE?

Whereas the Criminal Procedure Code is silent on this issue and there appears to be no local decision on the point, the English position from ancient times is as expressed in *Dickenson v Brown*¹⁹⁶ where the Court of King's Bench doubted the legality of a second arrest of the plaintiff upon a warrant which had already been used to effect an arrest on an earlier occasion. It would, indeed amount to an abuse of the instrumentality of an arrest warrant were it to be executed repeatedly

191 *Ibid*, s 112(1).

192 *Ibid*, s 112(2).

193 *Ibid*, s 113.

194 [2008] eKLR (Criminal Appeal No. 43 of 2007).

195 See also *James Muhia Muiruri v Republic* [2008] eKLR. Criminal Appeal 214 of 2007 & 215 of 2007 (Consolidated).

196 [1974] 1 Esp. 218.

for such an employment of it would turn it into an instrument of oppression and could also invite the mischief of circumventing the judicial angle where—under the police must prove on oath that a warrant should issue at all.

4.5 MISCELLANEOUS PROVISIONS REGARDING PROCESSES

These give magistrates additional powers to enforce attendance. Examples include:

i. Power to make bond for appearance

Where a person for whose appearance or arrest the officer presiding in a Court is empowered to issue summons or warrant happens to be present in Court, the officer may, without having to issue a summons or a warrant, require him to execute a bond with or without sureties, for his appearance in that Court.¹⁹⁷

ii. Arrest for breach of Bond

Should a person who has been freed on bond abscond or fail to appear before that Court, the officer presiding may issue a warrant directing that such person be arrested and produced before him.¹⁹⁸

iii. Power to issue production orders

Where a person for whose appearance or arrest a Court is empowered to issue summons or warrant is confined in a prison within the local limits of jurisdiction, the Court may issue an order to the officer in charge of that prison requiring him to bring the prisoner in proper custody, at a time to be named in the order, before the Court. Such order is referred to as a *production order*. The officer so in charge must provide for the safe custody of the prisoner during his absence from the prison.¹⁹⁹

4.6 RIGHTS OF ARRESTED PERSONS²⁰⁰

One of the most significant criminal justice developments brought about by the adoption of the new Constitution is the elaboration and elevation of the rights of an accused person to constitutional status in clear response to a history of gross

¹⁹⁷ s 114 of the CPC.

¹⁹⁸ *Ibid*, s 115.

¹⁹⁹ *Ibid*, s 116.

²⁰⁰ Art 49 of the Constitution.

Arrests

abuses. This clearly imposes upon law enforcement agencies a greater duty of circumspection and regard to legality when effecting the arrest of suspects as well as their treatment of them while in their custody.

An arrested person has the right to:²⁰¹

- (a) prompt information, in the American *Miranda*²⁰² or *Judge's Rules* sense, in a language he understands, of:
 - (i) the reason for the arrest;
 - (ii) the right to remain silent; and
 - (iii) the consequences of not remaining silent (namely that if he waives that right, anything he says will be taken down in writing and may be used in evidence.);
- (b) silence;
- (c) communication with an advocate and other persons whose assistance is necessary;
- (d) non- compulsion to self incrimination;
- (e) be held separately from convicts;
- (f) prompt production in court within twenty-four hours after being arrested; or before the expiry of the next court day if the twenty-four hour period ends outside ordinary court hours;
- (g) be charged when first produced in court, or informed of the reason for continued detention, or to be released; and
- (h) be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

The Constitution has also outlawed the pre-trial detention of all persons charged with certain petty offences specifically those punishable by a fine only or by imprisonment for not more than six months.²⁰³ The effect of this is that all such persons must be set at liberty perhaps on free bond for, to impose any other bail and bond terms, which they may be unable to meet or raise, would expose them to remand custody in default yet this is the very situation proscribed by the Constitution. This raises serious questions as to what assurances the court has that such persons would turn up at the trial and has already attracted judicial disquiet.²⁰⁴

201 *Ibid*, art 1

202 *Miranda v Arizona* 384 US 436 (1966).

203 *Supra* nt 201, s-art 2

204 See, for instance, Justice Fred Ochieng's concerns in *Republic v Joseph Wambua Mutunga and 3 others HC Criminal Case No 23 of 2008* (Unreported), where he says: "... there is a real probability that many persons who are charged with offences that attract only fines or that attract imprisonment for six (6) months or less, will not bother to turn up in court for their trials. The nett effect will be to increase the volumes of pending cases in leaps and bounds."

4.7 CONSTITUTIONAL ISSUES RAISED BY ARRESTS

Considering the very personal (often dramatic) and invasive nature of an arrest, both in fact and in effect, it is not at all surprising that it raises various issues implicating the Constitution. What is more, the Kenyan experience is that one too many times law enforcement officers, in particular the police, have exhibited a certain proclivity towards indiscriminate arrest whenever offences have been committed without first going through the pain staking process of determining who is truly implicated. This is an issue the Court of Appeal itself was aware of in *Shimechero v Republic*,²⁰⁵ and said:

The practice of rounding up all and sundry who may be connected, however remotely, with a criminal investigation, and detaining them unlawfully in police custody for questioning, is strongly to be deprecated.

Further, in the case of *Mohamed v Republic*,²⁰⁶ the High Court stated that the police have no authority to hold in their custody persons who are only witnesses to the commission of a crime where such persons have been summoned to the police station or have taken themselves there to record statements. Moreover, witnesses to the commission of a crime should be released unconditionally from the police stations after they have recorded their statements. They can only be bonded later to attend court to give evidence.

In *Gachara v Republic*,²⁰⁷ the Court said that liberty is one of the fundamental rights and freedoms of the individuals protected by the Constitution of Kenya but that it was subject to its not prejudicing the rights and freedoms of others or the public interest.

In the case of *Republic v Talib Abubakar and 5 others*,²⁰⁸ the High Court held that the question whether or not the prosecutorial process has complied with the terms of section 72(3) of the repealed Constitution is a judicial question to be determined on legal principles, after hearing the parties. Although the interpretation of the Constitution is a function of the High Court and not the subordinate Courts, facts as may affect the constitutional decision arrived at, may in many cases be best determined by the trial Court. The Court made a reference to the case of *Dickson Ndicho Kago v Republic*,²⁰⁹ where it was stated that:

It is clear from the depositions and from submissions that hardly any reference at all was made to the right of the accused not to be detained for longer than was provided

²⁰⁵ Criminal Appeal No. 119 of 1974 (unreported).

²⁰⁶ [2003] KLR 338.

²⁰⁷ [2004] 1 KLR 373.

²⁰⁸ Criminal Revision No. 1 of 2008.

²⁰⁹ High Court Miscellaneous Application No. 639 of 2007.

Arrests

for, and so the purely-factual question whether there was cause for longer detention, was not at all considered. The trial Court is the tribunal of the fact in this matter, which ought to have the first opportunity to deal with that question.

It seems also that the objection as to the contravention of this right would be overruled if brought up too late in the day. Thus in *Morris Ngacha Njuguna and 3 others v Republic*,²¹⁰ when one of the appellants first raised the issue at the Court of Appeal, the Court was unimpressed and said:

[I]f the second appellant felt his rights under the Constitution have been violated the best course of action would have been to file an application under the provisions of the Constitution to enable the relevant Court to investigate the issue. As the matter stands now, the issue having not been raised in the two Courts below, we can only base our decision on the material before us. The material is inadequate and on that basis it cannot be said that the second appellant's rights under section 72(3) (b) of the Constitution were breached.

There is no unanimity of opinion in legal circles or even the Court of Appeal itself. In the case of *Joseph Amos Owino v Republic*,²¹¹ the Court said that the issue of violation of constitutional rights should be raised at the earliest opportunity only if it was dealing with a complaint of such a nature coming from an accused person who had been represented by an advocate either at his trial or on the first appeal. In such a case, the Court stated that it would assume that the accused was legally advised on his legal rights, and if he did not raise such issues, then he would be considered to have waived them and would not be heard to reclaim the same on second appeal.

In this case, the appellant represented himself both at the trial and during his first appeal. This, the Court observed, was in acceptance that being illiterate in law, the appellant may not have been aware of his constitutional rights as an advocate may have been and therefore relied wholly on the Court to ensure compliance with such rights by the prosecution.

The question as to the fate of the accused person who has been detained for longer than the expected constitutional period has given rise to a debate on what remedy is to be given by the Court. The cure that the Constitution prescribes is, on a plain reading of the text, compensation from the person that unlawfully arrests or detains him.

210 Criminal Appeal No. 232 of 2006.

211 Criminal Appeal No. 450 of 2007 Court of Appeal.

Essentials of Criminal Procedure in Kenya

Consistent with this reading of the Constitution, and which appears to be the more doctrinally sound, being more felicitate to the text, the immediate consequence of over-shooting the constitutional time limit is to require the prosecution to proffer an explanation for the delay. The explanation may be reasonable or not. Where the Court is not satisfied by such an explanation, the Court may make a note that the accused person's rights have been violated. This does not, however, affect the merits of the case against the accused person, which must run its full course.

It is only if the delay is so long and extended as to lead to an *ipso facto* negation of his rights to a fair trial under section 77 of the former Constitution (or Article 50 of the current) that a question of acquittal can arise. There actually was a remedy under section 72 of the Constitution for such violations; and that remedy lies in an appropriate declaration and an award of damages— certainly not acquittals. The available remedies under the new Constitution are provided under Article 23(3) and include, for relevance, a declaration of rights and an order for compensation.

Consistent with this argument is the case of *Eliud Njeru Nyaga v Republic*,²¹² where the Court was unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity and therefore there was no reasonable explanation for the delay. The Court said:

Even section 72(3) of the Constitution, which deals with the period of bringing an accused person to Court, recognizes that there can be a valid explanation for failure to bring an accused person to Court as soon as reasonably practicable.

In *David Waiganjo Wainina v Republic*,²¹³ the Court said:

... we think it would be wrong for anybody to contend that where there has been inordinate delay in bringing an accused to Court, then without any further investigations such a person ought to be set free regardless of what had led to his arrest and incarceration.

In the case of *Murunga v Republic*,²¹⁴ the Court said that it was the burden of the prosecution to raise the issue about the unlawful detention of the accused in the custody of the police. The prosecuting authorities, after all, know the time and date when the accused was arrested. They also know when the arrested person

212 Criminal Appeal No. 182 of 2006.

213 Criminal Appeal No. 113 of 2005.

214 [2008]1 KLR 1.

Arrests

is taken to Court, and accordingly know or ought to know whether the arrested person has been in custody for longer than the expected period. The Court stated:

Under section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged if the person accused raises a complaint. But in case the prosecution does not offer any explanation, then the Court as the ultimate enforcer of the provisions of the Constitution must raise the issue. . . That would help the High Court or any other Court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case.

And in the case of *Albanus Mwasia Mutua v Republic*²¹⁵ the Court suggested some examples of what might amount to an acceptable explanation for the delay:

1. It may be that upon arrest and being taken to the police station the accused person fell ill, was taken to hospital and was admitted and kept there in excess of the period allowed; or
2. The accused person was arrested on a Friday evening and because Courts do not operate on weekends he was not brought to Court until the next working day; and neither was it possible to release the accused on bail at the material time, or;
3. It may have been that the Court house was far from the police station, or;
4. The station vehicle broke down or had no fuel

Against this position is a new fangled jurisprudence espoused by some judges who have ruled that any violation, no matter how slight, of an accused person's right to be arraigned in Court in the constitutionally provided for period should lead to an automatic acquittal. To this line of thinking, the merits or evidential strength of the case facing the accused, as well as the seriousness of the offence with which he is charged, are absolutely of no moment. Much as this school appears to be strike a blow for constitutional rights, it has, in fact, a deleterious effect on the same in that by lionizing accused persons' rights and causing them to trump the public interest absent textual backing, they stretch rights too thin. They also invite mischief in that criminals would collude with corrupt police officers to hold them for longer by a day or two and immediately buy them acquittals.

The first of these cases is *Ann Njogu and 5 others v Republic*,²¹⁶ a decision of the High Court in Nairobi. There, Justice Onesmus Mutungi, while dealing with

215 Criminal Appeal No. 120 of 2004.

216 HC Misc. Application No 551 of 2007.

Essentials of Criminal Procedure in Kenya

the issue of delay in the absence of representation on the part of the State, took the view that, “...in the absence of the authorities that are detaining, despite being duly served, there is no explanation, good or otherwise, as to why the applicants were not brought before Court within 24 hours.”

The learned judge went on to say that at the tick of the 60th minute of the 24th hour, if the applicants had not been brought before the Court, every minute thereafter of their continued detention was an unmitigated illegality as it was a violation of their fundamental and constitutional rights. The Court went on to assert that there was as yet no known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his or her constitutional rights violated prior to the purported institution of the criminal proceedings complained against. Nor is there any room for the extension of the constitutionally provided for period of 24 hours. The Court went on to order the immediate release of the applicants.

A section of the Court of Appeal gave this reasoning a ringing endorsement in *Gerald Macharia Githuku v Republic*.²¹⁷ There, the appellant was arraigned in Court on a charge of robbery with violence. The date of his arrest was stated in the charge sheet to have been January 13, 1995 while the date of his first arraignment was stated as January 30, 1995, i.e. 17 days later. The appellant was tried, convicted and sentenced to death. After his first appeal to the High Court was dismissed, he brought a second appeal in which his counsel argued that the High Court had erred in affirming his conviction and sentence when his constitutional rights had been violated.

Appeal Judges E.O. O’Kubasu, J.W. Onyango Otieno and W.S. Deverell were unanimous in what they saw as a defence of constitutional rights. They stated that even though the delay of *three days* in bringing the appellant to Court did *not* cause him any prejudice and although the evidence showed that he was *guilty as charged*, nevertheless the failure by the prosecution to abide by the requirements of the Constitution could not be disregarded. The prosecution, on whom the burden of proof rested, had failed to satisfy the Court that the appellant, who was charged with a capital offence, had been brought before the Court as soon as was reasonably practicable.

And in the case of *Republic v James Njuguna Nyaga*²¹⁸ the High Court held that it would be failing in its duty by not declaring that case null and void due to contravention of the accused person’s right to be arraigned in Court in reasonable time. The Court said:

217 [2008] eKLR (Criminal Appeal No. 119 of 2004).

218 Criminal Case No 40 of 2007.

Arrests

... it is premised [on], and has its genesis [in] an illegality. And the position remains so irrespective of the weight of the evidence that the prosecution may adduce in support of the case. For such evidence will be in support of a vacuum- a nullity.

Better yet in the case of *Republic v Amos Karuga Karatu*,²¹⁹ the Court said:

A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to Court one day after the expiry of the statutory period required to arraign him to Court. Finally it matters not that the evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the Court, the prosecution remains a nullity.

It is easy to see that an incremental application of this new doctrine to its logical conclusion leads to a perverse subversion of the judicial process and has a dangerous potential for undermining both law enforcement efforts at curbing crime and the public confidence in the administration of justice and the rule of law. Fortunately, the tide of judicial thought seems to be turning decidedly in favour of the position we have previously espoused so that the violation-of-time-equals-acquittal seems to be receding as a relic to an aberrant moment only. Thus, in *Julius Kamau Mbugua v Republic*,²²⁰ one of the latest decisions of the Court of Appeal, delivered after the adoption of the new Constitution, Githinji, Waki and Visram JJA placed the law in this area on a proper footing. This should, respectfully, be considered the last word on this subject. The court first captured the issue at hand as;

...whether an unconstitutional extra judicial incarceration by the police before the suspect is charged in court either entitles the subject not to be tried for the offence for which he was arrested, or, if tried, whether he is entitled to a discharge or acquittal ... put in another way whether ...[it] entitles the suspect to go scot-free. ... This is a fundamental question of great public importance.

The court then proceeded to describe the decisions to the effect that the trial court would either have no jurisdiction or that further hearing would be an illegality or a nullity and that the accused should be acquitted without trial politely as, “Jurisprudence peculiar to this jurisdiction and has no parallel in international jurisprudence.” It then proceeded to state that,

There is no law including the 1963 Constitution before repeal which bars such prosecutions or ousts the jurisdiction of the criminal courts in such cases. The issue of jurisdiction does not with respect, arise. It is presumptuous, to say the least, for

219 [2008] eKLR (Criminal Case No. 12 of 2006).

220 Criminal Appeal No 50 of 2008 (Unreported)

Essentials of Criminal Procedure in Kenya

the courts to usurp the law making function of the Legislature in such an important subject ... the right is not designed to avoid trials on the merits. Similarly, the right protected ... is to be taken to court as soon as reasonably practicable. It is not a right not to be taken to court after unreasonable delay.

Even had the judges found that the extra judicial detention was unlawful, they would have “considered an acquittal or discharge was disproportionate, inappropriate and draconian as remedy since public security would be compromised” and agreed with Emukule J, from whose judgment they were sitting on appeal, that breach of the right entitled the aggrieved person to monetary compensation only, the same relief that had been granted by the Court of Appeal in *Kihoro v Attorney General of Kenya*.²²¹

The Constitution has now also decreed that a person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.²²² What is more, such a person is entitled to petition for an order of *habeas corpus*²²³ which is now not only a substantive and express constitutional right, but also one which is in the special category of Article 25 non-derogable fundamental rights and freedoms not open to any kind of limitation.²²⁴

Parliament is also under an obligation to enact legislation that provides for the humane treatment of persons detained, held in custody or imprisoned; and takes into account the relevant international human rights instruments²²⁵.

221 [1993] 23 LRC 390

222 Art 51 (1) of the Constitution

223 *Ibid*, art 51(2)

224 Together with freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude and the right to a fair trial.

225 *Ibid*, art 51(3)

CHAPTER FIVE

PROSECUTION

5.1 LEGAL BASIS OF PUBLIC PROSECUTIONS

Under article 157(6) of the Constitution, prosecutorial authority is vested in the Director of Public Prosecutions. He has powers to:

- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by him.

If any such discontinuance takes place after the close of the prosecution's case, the defendant shall be acquitted.²²⁶

The foregoing provision underscores the fact that it is the State through the Director of Public Prosecutions is bestowed with the power of controlling criminal prosecutions. This means that the Director of Public Prosecutions has a special constitutional role in the conduct of prosecutions and he is under duty to take into account and safeguard the public interest.²²⁷

In the case of *Republic v Attorney General and another ex parte Ng'eny*,²²⁸ the High Court stated that the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and this should apply *mutatis mutandis* to the Director of Public Prosecutions. In exercise of his powers he is not to be directed or controlled by any other person or authority. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.²²⁹ However, the Director of Public Prosecutions may not exercise that discretion arbitrarily and is expected to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.²³⁰

226 Art 157(7) of the Constitution.

227 See *Gregory and another v Republic thro' Nottingham and 2 others* [2004] 1 KLR 547 & *Wehliye v Republic* [2005] 1 KLR 837.

228 *Supra*.

229 s 157(10) of the Constitution.

230 s 157 (11) of the Constitution

Essentials of Criminal Procedure in Kenya

In a significant departure from the absolute sway formerly held by the Attorney General, the Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.²³¹ Furthermore, the High Court will in a proper case interfere with a criminal trial in the subordinate court if it is deemed that the prosecution is an abuse of the process of the court and/or because it is oppressive and vexatious.

These powers may be exercised by the Director of Public Prosecutions in person or by officers subordinate to him acting in accordance with his general or special instructions, and the said powers, in so far as they relate to the taking over, continuation or termination of criminal proceedings, are so exercisable to the exclusion of any other person or authority.²³²

The National Prosecution Policy published by the State Law Office stipulates the duties and responsibilities of the Department of Public Prosecutions as the following:²³³

1. To execute the constitutional mandate on criminal prosecutions by being an independent, fair and effective public service;
2. To undertake public prosecutions only on merit basis and in accordance with the law;
3. To base the decisions with regard to criminal prosecutions on an impartial and professional basis after assessment of the available evidence and the public interest;
4. To ensure that prosecutions are initiated only in those cases in which there is adequate evidence and where prosecution is justified in the public interest;
5. To take all prosecution decisions and conduct every prosecution in a timely, effective and efficient manner;
6. To ensure that all decisions to prosecute are made with consistency and with due regard to the law and individual facts of the particular case in question;
7. To ensure that all conduct is undertaken with complete impartiality to the highest ethical and professional standards;
8. To treat all persons, including accused persons in criminal charges, fairly and
9. To treat all victims and witnesses with respect and sensitivity.

5.2 DECISION TO PROSECUTE

The decision to prosecute or to discontinue a prosecution is the most important decision that a prosecutor makes in the criminal justice process. Indeed, prosecutions that are not well founded in law or fact, or which do not serve the public interest may unfairly expose citizens to the anxiety, expense and embarrassment of a trial while the failure to effectively prosecute guilty parties can directly impact public safety. Wrong decisions tend to undermine the confidence of the community in

²³¹ *Ibid*, art 157(8)

²³² Art 157(9) of the Constitution.

²³³ Republic of Kenya (2007) The National Prosecution Policy, State Law Office, p7.

the criminal justice system.

Ultimate prosecutorial discretion formerly lay entirely with the Attorney General. Some categories of cases cannot, in fact, be lodged in court without his consent or express concurrence. These include prosecution under the Anti-Corruption and Economic Crimes Act.²³⁴ Under the new Constitution, however, the powers of the Director of Public Prosecutions are no longer exclusive and have also been curtailed in a number of important ways. In particular Parliament is at liberty to confer prosecutorial powers on other authorities;²³⁵ he may not terminate pending criminal cases without the permission of the court²³⁶ and he may no longer take over pending private prosecutions or criminal proceedings commenced by other authorities unless with the latter's permission.²³⁷ Moreover, the Director of Public Prosecutions serves under a limited and non-renewable tenure of eight years.²³⁸

In his proper sphere, the Director of Public Prosecutions is expected to act fairly, conscientiously and with due regard to principle as opposed to arbitrarily, oppressively or contrary to public policy. He and the officers subordinate to him who may exercise delegated authority on his behalf must strive to reflect community opinion in the making of decisions as to whether to prosecute. In this manner he is representing both the State and the society in criminal justice.

Prosecutorial discretion has to be exercised once a police report has been made and a suspect arrested or his arrest is contemplated. The prosecutor is required to apply his mind in deciding whether or not to prosecute. In this regard, two principle tests are to be applied, namely:

1. The Evidential Test
2. The Public Interest Test

Both tests must be satisfied for the ensuing prosecution to be seen as justified. These twin tests are worthy of some elaboration.

5.2.1 The Evidential test

This is the most critical test that the prosecutor must employ and be satisfied about, as a purely professional exercise, before he endorses a case for prosecution. To satisfy himself, the prosecutor must read the complaint, the witness statements recorded, the documentary evidence and other material to determine whether or

234 Act No. 3 of 2003, s 35 whereof requires that the Kenya Anti –Corruption Commission must report the result of each investigation to the Attorney General and where appropriate with a recommendation for prosecution. No prosecution can ensue, however, unless the Attorney General concurs.

235 Article 157(12) of the Constitution.

236 *Ibid*, s-art 8.

237 *Ibid*, s-art 6(b).

238 *Ibid*, s-art 5.

not there is enough evidence to support a credible prosecution. He must be satisfied that there is “a realistic prospect of conviction” considering that the standard of proof in criminal cases has to be beyond reasonable doubt.

In testing the evidence available, a prosecutor must keep his mind steady to two principles namely admissibility of the evidence and the reliability of the witnesses proposed to be called.

If the prosecutor is not satisfied that the evidence available is sufficient to support a prosecution, and if there is no real likelihood that such evidence as is required will be available before close of the prosecution case and once internal review within the Department of Public Prosecutions has been conducted, the prosecution ought not to be instituted or if already instituted, ought to be halted forthwith and the suspect discharged without further ado.

5.2.2 The Public Interest Test²³⁹

Even where a case does satisfy the evidential test, prosecution is not inevitable. The prosecutor must employ a further test, which is a complex one, and demands of the prosecutor the highest professional judgment and keen awareness of the social, political and economic environment within which any prosecution must be conducted or continued. If the prosecutor forms the opinion that there are

²³⁹ State Law Office (2007) *The National Prosecution Policy*, Republic of Kenya, p16 et seq James A. Inciardi in his *Criminal Justice* [7th Edition Oxford University Press 2002]: captures the factors as:

- i. Not to prosecute the accused person in exchange for information about more serious crimes
- ii. Conservation of resources for more serious cases
- iii. Where the accused person poses a serious threat to the welfare of the society, or when the offence is a minor one, the decision to prosecute or not to prosecute is an easier one to make. Normally the offence and its related offences fall somewhere between these two extremes; and the prosecutor must decide whether the benefit to be derived from the prosecution would outweigh the costs of such an action.
- iv. The subject matter of criminal proceedings is far from the criminal offence itself. If any, public consideration is the dominant consideration.²³⁹ Theoretically, this is an important factor to consider when making a decision on whether or not to institute criminal proceedings against an accused person. In the performance of their duties, prosecutors are required to act with objectivity and to pay attention to all relevant circumstances, irrespective of whether they are to advantage or disadvantage the victim. They must carry out their functions impartially and avoid all forms of discrimination.²³⁹
- v. The type of case at hand: prosecutors are not inclined or may not be keen to seek criminal penalties in some offences such as:
 - a) Minor domestic disturbances
 - b) Assaults and petty thefts in which the victim and the offender are in the same family or have some social relationship
 - c) Statutory rape where both parties are young
 - d) First offence car thefts that involve teenagers taking a short joyride
 - e) Checks drawn on insufficient funds
 - f) Shoplifting by first offenders, particularly when restitution is made
 - g) Criminal acts by offenders who suffer from emotional disorders.

Prosecution

preponderant public interest factors militating against instituting or continuing the prosecution, the same ought not to commence or proceed.

In assessing the public interest, the prosecutor has to ponder and finely balance a number of relevant considerations falling under three general rubrics namely the nature and seriousness of the offence, the interest of the victim and the broader community and the circumstances of the offender. In particular, he has to consider:

- i. Whether or not a possible conviction will result in a significant sentence reflecting parliament's assessment of the gravity of the offence;
- ii. Whether the offence committed involved offensive weapons, actual violence or a breach of the peace;
- iii. Whether the offence was against a law enforcement officer, public servant or a provider of essential services e.g. a doctor, nurse or fireman;
- iv. Whether the suspect holds a position of trust or authority so that failing to prosecute him will set a bad precedent;
- v. Whether the suspect is a king pin leader or organizer of crime;
- vi. Whether the victim was a child, a person with disability or one vulnerable on account of age or mental capacity;
- vii. Whether the offence was motivated by discrimination or contempt against the victim or a class to which he belongs;
- viii. Whether the suspect is a habitual offender that should not be left scot-free;
- ix. Whether the offence is a technical one committed on the basis of ignorance or misunderstanding;
- x. Whether the offence is in the circumstances a trivial one that has already been or can easily be rectified;
- xi. Whether the prosecution may merely assist the complainant to gain leverage against the suspect through the use of the criminal justice system to settle private issues such as debt collection;
- xii. Whether there has been undue and unconscionable delay between the commission of the offence and the intended prosecution

5.3 CHALLENGING PROSECUTIONS

In view of the manner in which the prosecutor must weigh, consider and balance as best he can various competing interests, there is much credit in the sentiment that:

In practice, the prosecutor's office is the focal point of an exchange system in which numerous markets like relationships influence the allocation of justice.²⁴⁰

240 James A. Inciardi (2002) *Criminal Justice* [7th Edition] Oxford University Press pp341.

Essentials of Criminal Procedure in Kenya

And it is for precisely this reason that on many occasions, interested persons, principally those against whom decisions to prosecute have been made, have moved the courts to challenge the same. There are two main methods of doing so:

- a) By way of constitutional reference invoking the High Court's supervisory, interpretative or enforcement jurisdictions previously discussed
- b) By way of judicial review seeking in the main orders of *Certiorari*, to quash the decision to prosecute and of *Prohibition* to stop the start or continuance of such prosecution

Whichever method an applicant chooses, he ordinarily applies for interim relief stopping the magistrate's court from entertaining or continuing with the prosecution pending the hearing of the substantive application on its merits. In appropriate cases, the High Court would grant temporary stay since, as the court had to say in *Kipng'eno arap Ng'eny v Attorney General*:²⁴¹

In such a case it would be against all common case not to grant a stay of the criminal proceedings awaiting the outcome of the application in the High Court. The grant of leave is recognition that the applicants have a case which merits further examination by the Court. We submit that our constitutional order has deliberately, and consistent with the doctrine of separation of powers, reserved the question of prosecutorial discretion to the autonomous exercise of the Attorney General.

This does not bar scrutiny of such exercise to determine propriety and this, too, finds foundation in the equally important principle of checks and balances. In the end it is a fine and judicious line that has to be drawn consistent with a balancing of interests and principles. The proper approach is found in the case of *D.P .P. v Humphreys*,²⁴² where Lord Salmon said that a judge has not and should not appear to have any responsibility for the institution of criminal prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy it ought not to have been brought. It is only when the prosecution amounts to an abuse of the process of Court and is oppressive and vexatious that the judge has power to intervene.

The High Court has been invited on numerous occasions to rule on challenges to prosecutions. These have been founded on multifarious reasons.

In the case of *Republic v Peter Kamau Ndambo*,²⁴³ the learned judge affirmed 6 situations in which the Court has power to prevent the prosecution from proceeding with the trial of an accused person:

²⁴¹ [2001] eKLR (Miscellaneous Application No. 406 of 01).

²⁴² [1976] 2 All E.R. 497.

²⁴³ Criminal Case No. 28 of 1993.

Prosecution

- i. On motion to quash or demurrer pleaded it is held defective in substance or form and not amended
- ii. Matter in bar is pleaded e.g. *autrefois acquit* and the plea is tried or confirmed in favour of the accused
- iii. A *Nolle prosequi* is entered by Attorney General
- iv. The indictment discloses an offence which a particular Court has no jurisdiction to try
- v. The prosecution amounts to an abuse of process of the Court and is oppressive and vexatious that the judge has power to intervene
- vi. Death of the accused person

In the celebrated case of *Githunguri v Republic*,²⁴⁴ the High Court, while considering a constitutional challenge to prosecution held that delay of itself with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events constituting the offence both vexatious and an abuse. It was also said that the decision to prosecute may be lost if the accused has been publicly informed that he will not be prosecuted and property has been restored to him. As a consequence of being led to believe that there would be no prosecution, the accused may have destroyed or lost evidence in his favour. The court summarized the instances warranting interference with the Attorney General's powers as follows:

- i. Where a criminal prosecution is an abuse of court process
- ii. Where a prosecution is in contravention of a person's constitutional freedoms and rights
- iii. Where the prosecution is contrary to public policy or interest²⁴⁵

This was echoed and restated in the case of *Republic v Pattni*²⁴⁶ in which the Court held that where there is inordinate delay, the Attorney General may lose his right to prosecute.

K.H. Rawal, J. in *John Muruitu Kigwe and another v Republic*²⁴⁷ held that the court has inherent power to terminate proceedings it decides are an abuse of the process and thus protect citizens from malicious prosecutions that may lead to unnecessary infringement and curtailing of their rights.

In *Samuel Kamau Macharia and Kibe v Attorney General*,²⁴⁸ it was held that where a prosecution is instituted for any other purpose than to uphold the legitimate

244 [1985] KLR 34.

245 See also the case of *Alielo v Republic* [2004] 2 KLR 333.

246 HCCC 229 OF 2003.

247 HCCC 223/2000.

248 High Court Miscellaneous Application No. 356 of 2000.

Essentials of Criminal Procedure in Kenya

ends of criminal law, the Court will come out strongly to protect any such accused persons.

The orders of *Certiorari* and *Prohibition*, so commonly used in aid of persons accused of criminal offences have their parentage in the ancient prerogatives of the Crown and are among the writs contemplated by article 165(6) of the Constitution as available from the High Court. In seeking any of the above writs, a person must apply for leave from a judge in chambers *ex parte* in accordance with the elaborate procedure set out in Order 59 of the Civil Procedure Rules.²⁴⁹

Where the judge so orders, the grant of such leave may operate as a stay of the proceedings being impugned. In view, however, of the fact that such an order is quite consequential and literally stops proceedings in their tracks, there is considerable merit in an approach where a court grants leave *ex parte* but adjourns the issue of stay for argument *inter partes* to allow the prosecutor to have a say before the drastic order is given. This was the path taken in *R v Kensington and Chelsea Royal London Borough Council ex parte Hammel*,²⁵⁰ where the English Court of Appeal held that unless the relief is of a particular urgency, the judge should normally adjourn the particular application for an *inter partes* hearing.

This, however, is a highly contested issue with various judges taking divergent and sometimes diametrically opposed positions. There is no denying, though, that interim orders staying criminal proceedings are a major contributor to the clogging of the wheels of justice for it is not uncommon for suspects, especially in the anti-corruption area, to rush to the High Court in extreme urgency and there obtain, *ex parte*, orders that appear to the issuing judge wholly deserved, but to promptly go to sleep and make no effort to have their substantive motions heard and determined. The mischief is probably curable by a legislative or directive

249 Under the Civil Procedure Act, Cap 21 Laws of Kenya. In the case of *Republic v Communications Commissions of Kenya ex parte East Africa Televisions Network Ltd* [2001] KLR, the Court said that the power to issue judicial review orders of mandamus, prohibition and certiorari is given to the High Court by a separate Act of Parliament namely the Law Reform Act. Further that the Law Reform Act does not say that these provisions are subject to the provisions of any other Act of Parliament. The High Court must not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari except in any case in which the High Court in England is, by virtue of the provisions of s 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom, empowered to make an order of mandamus, prohibition or certiorari. No return is made to any order, and no pleadings in prohibition are allowed, but the order shall be final, subject to the right of appeal. In any written law, references to any writ of mandamus, prohibition or certiorari are construed as references to the corresponding order, and references to the issue or award of any writ are construed as references to the making of the corresponding order.

250 [1989] 1 All E.R. 1202.

intervention that would give such interim orders of stay a limited life at the expiry of which they lapse. That way applicants would be motivated to ensure their pleas are determined on merit before their protection expires.

5.4 ROLE OF PROSECUTOR

That the prosecutor occupies a crucial position in the criminal justice process is a fact acknowledged across the board. The role he plays has come under searching scrutiny by the public generally who are gravely concerned that public prosecutions in this country have a dismal record of success with too many cases being lost. It has been suggested that a case may be lost in Court for many reasons such as:²⁵¹

- i. Poor case management by the prosecution
- ii. Insufficient evidence (not orchestrated by the victim)
- iii. Shoddy investigations by the police
- iv. Corruption
- v. The unavailability of witnesses

The Department of Public Prosecution is fully aware of the far reaching consequences of the manner in which a prosecutor exercises his discretion at specific stages of the criminal justice process. These include:²⁵²

- a) The decision whether or not to institute criminal proceedings against an accused
- b) The decision whether or not to withdraw charges or stop a prosecution
- c) The decision whether or not to oppose an application for bail or release by an accused person who is in custody following arrest
- d) The decision about which crimes to charge an accused with and in which court the trial should proceed
- e) The decision whether or not to accept a plea of guilty tendered by an accused
- f) The decision about which evidence to produce during the trial
- g) The decision about which evidence to produce during sentencing proceedings in the event of a conviction and;
- h) The decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail or to seek review of proceedings

The main aim of criminal litigation is to get to the truth of the matter contested between the accused person and the State through the prosecutor.²⁵³ Whereas the

251 Report on Arrest, investigation and Prosecution by the Police in Kenya; prepared by the Oscar Foundation [2007].

252 Republic of Kenya, State Law Office; The National Prosecution Policy, 2007, p9.

253 See the case of *Republic v Attorney General and another ex parte Ng'eny (Supra)*.

Essentials of Criminal Procedure in Kenya

State seeks to protect its citizens' rights and freedoms by upholding the rule of law, the consequences and implications of a conviction on the life, liberty and reputation are severe and far reaching. It is for this reason that the prosecution must prove its case beyond reasonable doubt. Thus the State vests certain duties, responsibilities and roles on the prosecution in order to serve fair justice to its citizens. Empowered by the state, prosecutors are subject to special professional responsibility rules in addition to those binding all advocates in a Court of law.²⁵⁴

Unlike an advocate for the defence who must do his utmost, within the law, to ensure an acquittal for his client, the prosecutor stands on a different plane. Much as he must employ and apply himself diligently and with as much persuasive force and permissible passion, his primary goal is not and ought never be to secure a conviction. *Archbold's Criminal Proceedings*²⁵⁵ states the position in these terms:

Prosecuting Counsel should not attempt to obtain a conviction by all means at his command. He should not regard himself as appearing for any party. He should lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution and should assist the court on all matters of law applicable to the case.

In our own jurisprudence, his role was succinctly captured in the case of *Juma and others v AG*,²⁵⁶ where Msagha and Kuloba JJ stated:

Always remember that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the Court what the State considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented; and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing. His function is a matter of public duty which in civil life there can be none charged greater personal responsibility. It should be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.

This conception of the role of the prosecutor as that of bringing all facts of the case as completely and as fairly as possible for the Court to ensure a fair determination was soundly endorsed by the Court of Appeal in *Thomas Patrick Cholmondley v Republic*.²⁵⁷

It is in light of this that there is imposed upon the prosecution a duty of pre-trial disclosure requiring that all statements and exhibits intended to be used at the trial

254 See generally, Inciardi (*Supra*) for a discussion of this subject.

255 2002, pp324 para 33-11.1

256 High Court Miscellaneous Application No 345 of 2001(unreported).

257 [2008] eKLR (Criminal Appeal No. 116 of 2007).

Prosecution

must be availed to the defence beforehand. This is now a constitutional duty flowing from the accused person's right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.²⁵⁸ It has been held that:²⁵⁹

A trial in a criminal Court is in the nature of a contest. A fair hearing required by its nature, equality between its contestants, subject to the supreme principles of criminal jurisprudence, requiring the presumption of innocence and that the guilt of the accused be proved beyond any reasonable doubt. When one of the contestants has no pre trial access to the statements taken by the police from potential witnesses, the contest can be neither equal nor fair. . . Non disclosure is a potent source of injustice.

The foregoing is an echo of what Glidewell, Nolan and Steyn LJ had expressed to be the English position in *Republic v Ward*²⁶⁰

The prosecutor's duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution's case or to strengthen the defence, required the police to disclose to the defence all the witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued after the pre-trial period and throughout the trial, to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all experiments and tests carried out by expert witnesses.

Any failure to disclose such material or deliberate concealment of the same reduces the ensuing trial to an ambush and constitutes an improper attempt on the part of the prosecution to gain an undeserved or unfair advantage over the accused or cause the accused to suffer unfair disadvantage or prejudice. In *Republic v Pattni*,²⁶¹ *Lesiit J*, after dealing extensively and exhaustively with the duties that a prosecutor must discharge categorically concluded, "I am fully persuaded that witness statements, exhibits and documents obtained by the prosecution after investigations are not the property of the prosecution but of the public to ensure that justice is done."

Indisputably, the courts have been right in upholding and enforcing the pre-trial disclosure duty of the prosecution. It does seem, however, that the Court of Appeal

258 Article 50(2)(j).

259 High Court Misc Appl No 345 of 2001.

260 [1993] 2 ALL ER 557.

261 [2005] 1 KLR 310.

Essentials of Criminal Procedure in Kenya

in *Chomondley* over- reached and probably misdirected itself in categorically stating that the defence has no corresponding duty to make available witness statements to the prosecution. It seems plain that once an accused person has been placed on his defence and he indicates that he will be calling witnesses; there is nothing objectionable about him being required to give details of the said witnesses and to avail copies of their statements. It would only be offensive to law and contrary to the constitutional right of silence were the same to be required of his own statement.

Although not fixated on seeking a conviction at any cost, the prosecutor's responsibilities, though several,²⁶² can be seen as threefold:

1. Enforcing the law,
2. Representing the government in matters of criminal law and
3. Representing the society in the attainment of criminal justice.

262 To effectively perform his role, the prosecutor is entrusted with other duties that realize this function.

1. It is the prosecutor who decides how cases brought by the police will be disposed of, which cases will be pursued through the Courts and whether the original charges against an accused may be reduced to some lesser offence.
2. In some cases during criminal investigation, the prosecutor works with the police in the preparation and approval of arrest and search warrants before they are formally issued by a magistrate.
3. After arrest, he screens cases to determine which should be prosecuted and which should be dropped. He assesses investigative reports to determine whether there is sufficient evidence to file a criminal complaint against a suspect or whether a complaint should be denied. Where authorized, a prosecutor supervises the legality of investigations. Although Article 157 of the Constitution makes the Attorney General the custodian of the authority for the conduct of criminal prosecutions, that does not give him or his officers the power to be involved in such investigations themselves. They should wait to receive a report from the Commissioner on the outcome of the investigations.
4. The prosecutor notifies victims of criminal charges, victims' rights, the availability of services, Court dates, plea agreement, changes in Court schedules, and the date, time and place of sentencing;
5. Witness trial preparation and management. In *Elirema and another v Republic* [2003] KLR 537, it was stated: "It is essential to consider the powers of a public prosecutor. . . The first elementary principle is that he is the person who decides what witnesses to call and that he, at any rate, at the trial, has complete control of the prosecution in Court. He can at any stage of the prosecution close his case and call no further evidence. . ."
6. The prosecutor prepares charges that establish a probable cause and bind an accused person over for trial.
7. Prosecutors ensure that accused persons are brought to Court to answer matters charged in the information. They participate in plea negotiations and agreements.
8. As representatives of the state, prosecutors initiate and argue out all motions in a criminal Court. They attempt to prove the guilt of the accused person beyond any reasonable doubt. In the case of *Sekitoleko v Uganda* Criminal Appeal No.99 of 1967, it was held that as a general rule of law, the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts. . . In criminal litigation, the burden of proof always rests with the prosecution. However, where facts are specially within knowledge of the accused, the burden of proof lies upon the accused: *Republic v Fateh Ali Shah Mushhad*, 7 E.A.C.A. 41
9. In appeals, they contest that convictions were obtained properly and should not be reversed.

5.5 *NOLLE PROSEQUI*

In the same manner that the Director of Public Prosecutions has a general discretion with regard to the institution of criminal prosecutions, he can terminate any existing criminal proceedings or part thereof at any time or any stage before verdict or judgment. A once potent, but now blunted, weapon he employs is the *Nolle prosequi*. This is a formal entry on the record by which the Director of Public Prosecutions states in court or declares in writing that he has determined that the case shall not continue. He may enter a *nolle prosequi*:

- a) As to some of the counts
- b) As to some of the accused persons
- c) Altogether

The Director of Public Prosecutions may decide to enter a *Nolle prosequi* due to many reasons such as:

- a) The insufficiency or inadmissibility of evidence to support the conviction of the accused²⁶³ – this happens when litigation has already begun. The *Nolle* removes cases in which the accused indeed may be guilty but the prosecution is almost certain to lose
- b) Plea negotiations²⁶⁴
- c) Necessity of screening out trivial cases.

Previously, once a *Nolle prosequi* was entered, the accused was at once discharged in respect of the charge for which the same was entered and it mattered not what stage the proceedings had reached so long as a verdict has not been rendered.²⁶⁵ Under article 157(7) of the new Constitution, however, if the discontinuance of any proceedings takes place after the close of the prosecution's case, the defendant shall be acquitted.

In *Rupert Nderitu and others v Republic*,²⁶⁶ it was held that the entering of a *Nolle prosequi* by the Attorney General is not subject to the leave of Court but now the reverse is the case. The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.²⁶⁷

263 *Seanoi Parsimei ole Sisina and others v Attorney General* Criminal case No. 345 of 2005 High Court.

264 *United States v Cowen* 524 F 2d 785 [1975].

265 s 82 of the CPC. This is bound to be amended in light of the constitutional provision.

266 Criminal Appeal No. 319 of 1985.

267 Art 157(8) of the Constitution.

Essentials of Criminal Procedure in Kenya

In the case of *Mwau v Republic*,²⁶⁸ it was held that the power of the Attorney General to enter a *Nolle prosequi* was vested in him to the exclusion of any other person or authority. However, this power could be delegated under section 27(6) of the former Constitution as well as to designated officers in writing pursuant to section 83 of the Criminal Procedure Code. This power is now vested in the Director of Public Prosecutions under article 157(6) and may be exercised in person or by subordinate officers acting in accordance with general or special instructions under article 157(9) of the Constitution.

Such was the sway the Attorney General had over criminal proceedings before subordinate courts that once he entered a *Nolle prosequi* or expressly instructed a public prosecutor to withdraw a prosecution under section 87(a) of the Criminal Procedure Code the magistrate immediately downed his tools.

In contrast, the High Court had, even before the adoption of the new Constitution, declared itself entitled to know the reasons why the Attorney General or his agent sought to enter a *Nolle prosequi*. This was the case in *Crispus Karanja Njogu v The A.G.*²⁶⁹ The Court further held that a subordinate Court has jurisdiction to entertain a *Nolle prosequi* after it has rejected an application by the prosecution to withdraw the case.²⁷⁰ The High Court proceeded on the basis that it was possessed of inherent supervisory jurisdiction to ascertain that the Attorney General's power and/or discretion was being properly exercised. In *Alielo v Republic*²⁷¹ the Court took the view that in declaring whether the exercise of the power of the entry of a *nolle prosequi* by the Attorney General was capricious, oppressive and an abuse of the process of Court, it was only the circumstances surrounding the entry of a *nolle prosequi* that would be taken into account in order to guide the Court to either grant or refuse such declaration.

Where the *Nolle prosequi* is deemed by the Court to be oppressive, unreasonable and capricious, it is declared null and void and of no legal consequence. In *Republic v Adan Keynan Wehliye*,²⁷² a High Court constitutional bench quashed a *Nolle prosequi* entered by the Attorney General after 11 witnesses out of a possible 40 witnesses had testified. The Court held that the entry of a *Nolle prosequi* at that stage in order to recharge the accused person with other accomplices was prejudicial to the trial rights of the accused.

268 [1985] KLR 748.

269 High Court Criminal Application No 39 of 2000.

270 Bench Book for Magistrates in Criminal Proceedings, 99 See also the case of *Alielo v Republic* [2004] 2 KLR 333.

271 [2004] 2 KLR 333.

272 [2005] 1 KLR 837.

Prosecution

On first principles, a *Nolle prosequi* does not preclude fresh information in respect of the same charge. This is because termination of a criminal proceeding by way of *nolle prosequi*, as with a public prosecutor's withdrawal from prosecution²⁷³ of any person in a trial before a subordinate court, leads to a discharge of the accused. Such discharge does not operate as a bar to subsequent proceedings against him on account of the same facts. If, however, the case is terminated after the close of the prosecution's case, it would lead to the defendant's acquittal.²⁷⁴

In *Alielo*, the Court held that in deciding whether an accused person will suffer any prejudice if the termination of a case is permitted with a view of freshly charging him, the following are the guiding principles, which should apply in every case where the Director of Public Prosecutions seeks to terminate a prosecution:

- a. Whether basic rights will be violated or are likely to be violated in a fresh trial after allowing the *nolle prosequi* to take effect.
- b. Whether the basic purpose of our criminal justice system which is predominantly to determine the guilt or innocence of the applicant is to be used towards the achievement of any different purpose and;
- c. Whether the intended fresh prosecution is called for merely to punish the applicant and thus oppress him through the use of the *nolle prosequi*.

A *nolle prosequi* can only be entered in respect of a living person. This was the holding in the Tanzanian case of *Msiwa and another v Republic*²⁷⁵ and would be the position in Kenya. In that case, the appellants were tried and convicted of intentional killing not amounting to murder. They appealed, contending that the accused was killed mistakenly while they attempted to apprehend him in the reasonable belief that he was an armed robber. Four accused persons were acquitted, including one person who died in custody and had his case discharged after entry of a *Nolle prosequi* by the State. The court of Appeal of Tanzania held that the wording of the Criminal Procedure Act of 1985 shows that a prosecution can only be withdrawn in case of a living person. Thus a dead person cannot be discharged.

273 Section 87(a) of the CPC. This section has traditionally been used for the termination of proceedings in lieu of the entry of a *nolle prosequi* although, on a proper reading, it is designed for the withdrawal, not of the case, but rather of the prosecutor himself. Formerly, so long as the accused had not entered his defence, the result would be a discharge but with the new Constitution, the line is drawn at the close of the prosecution case. Further, under the CPC the leave of the court was not necessary when the permission to withdraw had been given by the Attorney General but, under the new order, the permission of the Director of Public Prosecutions would not suffice.

274 Art 147(7).

275 [1999] 2 EA 190.

As there is no specific provision in statute dealing with accused persons who die before their cases are completed, the practise under common law should be considered, wherein the case against the dead accused abates. The prosecution ought to inform the court on this and provide written evidence, after which the court may mark the case as abated.

5.6 PRIVATE PROSECUTIONS

Even though the Director of Public Prosecutions has the predominant control of State or public prosecutions by virtue of powers vested in him by the Constitution, the same Constitution contemplates the conduct of prosecutions by other persons; namely *private prosecutors*. The right of a person to institute a private prosecution emanates from both the Constitution²⁷⁶ and the Criminal Procedure Code²⁷⁷ and is a necessary and logical corollary to the fact that the Attorney General may choose not to prosecute an otherwise prosecutable case.

The objective and purpose of the phenomenon of private prosecution was well stated by House of Lords in *Gouriet v Union of Post Office Workers*.²⁷⁸ Lord Wilberforce said that it is the duty of the Attorney General to take steps to enforce the law by prosecuting a person who commits an offence. Failure to do so, without good cause, is a breach of that duty. The individual in such cases who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This right remains a valuable constitutional safeguard against inertia or partiality on the part of authority.

In the case of *Richard Kimani and M. Maina v Nathan Kahara*,²⁷⁹ the High Court saw the mechanism of private prosecutions as a counter-weight to the influence of the wealthy and the powerful, who may wish to stifle their own prosecutions for offences committed.

Thus, a private citizen may wish to institute a private prosecution where:

- i. The State is unwilling to prosecute or;
- ii. There is real apprehension or fear of official lethargy, corruption or bias

In the *Kimani Case*,²⁸⁰ a complainant reported an alleged forgery of documents

276 Article 157(6)(b)

277 *Ibid*, ss 88 and 89. See also *Public Corruption, Ethics and Governance Watch v Hon Ali Chirau Makwere* [2004] eKlr.

278 [1977] 3 All ER 70.

279 HC Criminal Case No. 11 of 1983.

280 *Ibid*.

Prosecution

and an unlawful assumption of office of the subject to the police but no action was taken. He applied to the Court to institute a private prosecution and succeeded.

In the case of *Gregory and another v Republic thro' Nottingham and 2 others*,²⁸¹ the Court said that it would not be averse to the private individual undertaking the prosecution task if:

- a) The complaint in question is one that essentially turns on limited, private rights
- b) The Attorney General (now Director of Public Prosecutions) is not inclined to take up the task

It, however, went further to rule that no private individual should undertake prosecution in broad matters that will incorporate the public interest. Referring to the *Gouriet Case*, the Court interpreted the scope for a private person to commence and proceed with a private prosecution as somehow limited:

- i. It generally excludes serious criminal matters
- ii. It applies where limited private interests are involved

A magistrate may permit the prosecution to be conducted by any person other than those authorized so to do by the Director of Public Prosecutions, to institute a private prosecution.²⁸² This is done by way of an application in person or through an advocate. The same person, referred to as a *private prosecutor*, has powers to withdraw the prosecution.²⁸³ In *Nunes v Republic*²⁸⁴ the High Court stated that in the circumstances of that case, permission to a private person to conduct a prosecution could be implied although not formally asked for or granted.

In asking for permission, an intended private prosecutor would first make a complaint in writing to the magistrate; and the magistrate, where satisfied that such complaint is substantial, may then draw or cause to be drawn up a formal charge containing a statement of the offence.

Such permission is a matter of discretion to be exercised judicially and judiciously. In the case of *Kimani v. Kahara*,²⁸⁵ the High Court laid down certain rules in form of questions that a magistrate should ask and be satisfied on before granting permission for private prosecution:

- i. Has any complaint been made to the Attorney General or the Police and if so,

281 [2004] 1 KLR 547.

282 s 88(1) of the CPC.

283 *Ibid*, s 88.

284 16 K.L.R. 126.

285 [1985] KLR 79.

Essentials of Criminal Procedure in Kenya

what was the result? If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and await a decision thereon or in simple cases like assault or trespass proceed to grant permission and notify the police of that fact.

- ii. How is the complainant involved – What is the complainant's *locus standi*?
- iii. Has he personally suffered any injury or danger?
- iv. Is he motivated, actuated or impelled by malice or political considerations?

Once a case has been terminated by the Director of Public Prosecutions, it would be improper and unseemly for an individual to attempt to revive the same by way of private prosecution. In the *Gregory Case*,²⁸⁶ the Court said that a private prosecutor must not set himself in competition with the Attorney General in the conduct of prosecutions. The Attorney General was responsible for the conduct of public prosecutions in the name of the Republic and he was under a duty to safeguard the public interest as he managed the prosecutorial process. Where the Attorney General terminated the conduct of criminal prosecutions which he himself had initiated, it would not be open to the private prosecutor to informally revive the proceedings.

The law has been that a private prosecutor may withdraw a prosecution but he must first obtain permission from the Court or the Attorney General. It can only be done before judgment is entered. Where this happens before the accused person is called upon to make his defence, he will be discharged but the discharge does not bar subsequent proceedings against him on account of the same facts. Where the accused has been called upon to make his defence, he will be acquitted.²⁸⁷

Private prosecutions were not immune to the overarching control of the Attorney General.²⁸⁸ In the case of *Shah v Patel and others*,²⁸⁹ the Court expressed the position, still valid today, that:

Even in private prosecutions, the prosecutor in law is the Crown (Republic) at the instance of the private prosecutor whoever he may be. That must be so. . . and flows directly from section 82 of the Criminal Procedure Code which gives the Attorney General residual control over every criminal proceeding at any stage thereof.

In essence, there existed the signal paradox that the very method devised to cure inertia on the part of the Attorney General remained captive to his control and

²⁸⁶ *Supra*.

²⁸⁷ s 87 of the CPC.

²⁸⁸ See also the case of *Raila Odinga v Professor George Saitoti* Misc Appl No 3 of 1995.

²⁸⁹ [1954] 21 E.A. C A 236.

Prosecution

many were the cases where, having previously refused to prosecute, he exhibited great alacrity in taking over resultant private prosecutions which then proceeded to promptly terminate by way of *Nolle prosequi*.²⁹⁰ These rather cynical interventions by the Attorney General largely contributed to many public calls for a reconsideration of his powers with regard to *Nolle prosequi* especially as they related to private prosecutions that were, *prima facie*, well founded and meritorious. It is for this reason that the new Constitution severely restricts prosecutorial discretion in the matter of *nolle prosequi* thereby limiting an otherwise useful tool for the management of public prosecutions.

290 See the case of *Clifford Derrick Otieno v Lucy Kibaki* Misc App No. 5 of 2005 at Chief Magistrates Court.

CHAPTER SIX

CHARGES AND INFORMATIONS

6.1 INSTITUTIONS OF CRIMINAL PROCEEDINGS

Proceedings may be instituted in court either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without a warrant.²⁹¹

A person who believes on reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.²⁹² The complaint may be written or *viva voce*. Where it is made *viva voce*, it is reduced to writing by the magistrate, and in either case, both the complainant and the magistrate sign the complaint.²⁹³

The magistrate then draws up or causes to be drawn up and signs a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.²⁹⁴ If the magistrate is of the opinion that a complaint or formal charge made or presented does not disclose an offence, he may make an order refusing to admit the complaint and must record his reasons for the order.²⁹⁵

Once he has received and signed the charge, the magistrate may then issue either a summons or a warrant to compel the attendance of the accused person before a subordinate Court having jurisdiction to try the offence alleged to have been committed.²⁹⁶ The validity of proceedings undertaken in pursuance of a complaint or charge are not affected either by a defect in the complaint or charge or by the fact that a summons or warrant was issued without a complaint or charge.²⁹⁷

A summons or warrant may be issued on any day including a Sunday.²⁹⁸

The fact that there is a different civil procedure given by the law to remedy a situation does not mean that where investigations have been undertaken and a

291 s 89(1) of the CPC.

292 *Ibid*, s 89(2).

293 *Ibid*, s 89(3).

294 *Ibid*, s 89(4).

295 *Ibid*, s 89(5).

296 *Ibid*, s 90(1).

297 *Ibid*, s 90(2).

298 *Ibid*, s 90(3).

criminal offence disclosed, the person found to have also contravened the criminal law cannot be charged with a criminal offence. This was the holding in *Kinyanjui v Republic*.²⁹⁹ Indeed, section 193A of the Criminal Procedure Code introduced in the year 2003 makes express provision for the existence of concurrent criminal and civil proceeding in the following terms:

Notwithstanding the provisions of any other law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

6.2 THE CHARGE SHEET

The terms *charge* and *information* are used interchangeably to refer to the statement of the offence or offences, which a person is accused of and the particulars thereof. The charge states concisely the offence which the accused person is alleged to have committed. It is the process by which the accused and the magistrate or judge is informed of a suspected offence.³⁰⁰

No case may proceed without a charge. In a Ugandan case; *Martino Judagi and others v West Nile District Administration*,³⁰¹ Udo Udoma C.J. held that the failure to frame a charge in the subordinate court was a fundamental and fatal mistake. The trial was declared a nullity and a retrial ordered.

So long as a charge contains a *statement of a specific offence or offences* with which the accused person is charged, together with such *particulars* as may be necessary to give reasonable information as to the nature of the offence, it is deemed to be sufficient.³⁰²

6.3 JOINDER OF COUNTS

Joinder refers to the action of '*charging together*'.

Joinder of counts refers to the charging together of a number of offences be they felonies or misdemeanours in the same charge sheet or information. Joinder is permissible if the offences charged are founded on the same facts or form or are part of a series of offences of the same or a similar character.³⁰³

299 [2004] 2 KLR 364.

300 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13).

301 [1963] E.A. 406.

302 s 134 of the CPC.

303 *Ibid*, s 135(1).

Charges and Informations

From a practical stand point, joinder of counts is both convenient and expedient in that it saves time and avoids a multiplicity of trials revolving around the same set of facts. It is also advantageous to the accused in that it not only saves him legal costs, but also affords him the opportunity of serving concurrent sentences in the event of conviction. In *Ngibuini v Republic*,³⁰⁴ the Court expressed the view that where there is a single complex of offences connected in kind and time, it is undesirable, although not unlawful, for the accused to be arraigned on separate trials. It is also undesirable to have separate trials as it denies the court the opportunity to look at the accused vis a vis the series of offences as a whole when sentencing.

The rule is that where an accused person is alleged to have committed more than one offence, he may be charged in the same proceedings with all the offences.³⁰⁵ This, however, should not embarrass the accused person or render his appeal (if any) nugatory or a waste of the Court's time. In *Godfrey Mandengwa v Republic*,³⁰⁶ the Court of Appeal stated that appellate courts have the jurisdiction to re-evaluate facts of a case and the evidence to satisfy themselves that the accused has not been prejudiced or embarrassed in answering the charge framed.

Where offences which are not founded on the same facts or do not form part of a series of the same or similar character are charged in the same charge sheet or information, the same will be ruled improper as it amounts to *misjoinder*.³⁰⁷

In the case of *Republic v Gulamhussein Jetha*,³⁰⁸ the appellant was convicted of one count for obtaining money by false pretences, and on another of giving false information. The facts alleged were that the appellant had obtained money by false pretences with intent to defraud on 27 June; and that on July 8; he made a false report that his house had been burgled and the money stolen. Ten days had lapsed between the obtaining of the money and the alleged false report of the burglary. The Court of Appeal held that it was doubtful whether the charge in respect of the false report could be said to have been founded on the same facts as the other charge and that it might, therefore, have been more properly made the subject of a separate trial.

In *Joseph v Republic*,³⁰⁹ the appellant was charged on three counts: wounding X with intent to cause grievous bodily harm, malicious damage to property and

304 [1987] KLR 517.

305 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13) pp34.

306 [2004] eKLR (Criminal Application No. 627 of 2004).

307 See the case of *Mwero v Republic* [1990] KLR 267.

308 [1946] 13 E.A.C.A 107.

309 [1954] 21 E.A.C.A. 311.

obstructing a police officer in the course of his duty. The first count contained no words to indicate that the alleged wounding with intent was in any way connected with the third count of attempting to resist the arrest. It was clear from the evidence that the three offences occurred in a series of attempts to resist arrest. This was not clear from the charges. The Court of Appeal considered that the third count was wrongly included in the charge. Hence there was a misjoinder.

Where, before a trial upon information or at any stage of the trial, the Court is of the opinion that the accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same information, or that for any other reason it is desirable to direct that the accused should be tried separately for any one or more offences charged in an information, the Court may order a *split-trial* also known as a *separation of trials* respecting any count or counts of the information.³¹⁰

In *Mongella v Republic*,³¹¹ it was held to be undesirable to charge an accused person on more than one charge of murder. The Court also said, in the case of *Velezi Kashizhs v Republic*³¹² that a charge of murder ought not to be laid with a count of another, lesser offence.³¹³ The basis for this distinction where murder is concerned must lie in the fact that it is the most serious offence there could ever be, attracting the ultimate penalty and it ought, therefore, to stand singly.

6.4 JOINDER OF PERSONS

This refers to the joining or charging together of two or more accused persons within the same charge or information and trying them together within the same proceedings.

The following persons may be so joined:³¹⁴

- i. Persons accused of the same offence committed in the course of the same transaction;
- ii. Persons accused of an offence and persons accused of abetment, or of an attempt to commit the said offence
- iii. Persons accused of two or more offences of the same kind committed jointly within a period of 12 months.

³¹⁰ s 275(4) of the CPC.

³¹¹ [1934] 1 E.A.C.A. 152.

³¹² [1954] 21 E.A.C.A. 389.

³¹³ see also Philbert *Loizeau and another v Republic* [1956] 23 E.A.C.A. 566.

³¹⁴ s 136 of the CPC.

Charges and Informations

- iv. Persons accused of different offences committed in the course of the same transaction.
- v. Persons charged with offences relating to theft or fraudulent acquisition of property between whom possession or retention of the said property has been transferred.
- vi. Persons accused of an offence relating to counterfeit coin, or of abetment or attempting to commit any such offence.

In *Republic v Ndungi and others*,³¹⁵ some herdsmen were convicted of contravening the Disease of Animals Ordinance prohibiting the movement of cattle in a proclaimed area. It was held that to try five persons together for different offences committed at different times and places is an irregularity vitiating the trial.

In *Republic v Hassan wa Saleh and another*,³¹⁶ it was held that two persons accused of raping two different women separately albeit at about the same time and place could not be tried at the same trial, the transaction not being the same.³¹⁷

In *Malebe v Republic*,³¹⁸ the three appellants faced separate counts of stealing by servant in one charge sheet. The particulars stated that the offences were committed on separate dates. The items alleged to have been stolen were different. They were not charged as having had a common intention. They appealed against their convictions and sentences. It was held by the High Court that a joint charge against several accused persons alleged to have committed separate offences on different dates amounts to a misjoinder and such a charge is defective. There should have been a separate charge for each person and separate count for each alleged offence committed on a different date.

6.5 RULES FOR THE FRAMING OF CHARGES³¹⁹

The basic principle of law governing the framing of charges is that an accused should be charged with an offence known to law and this has its foundation in the Constitution.³²⁰ The offence charged should be disclosed and stated in a concise, clear and unambiguous manner, in ordinary language that eschews legalese so that the accused may be able to understand it and plead thereto from a point of knowledge. It will also enable an accused person to prepare his defence to the charge. This principle was re-stated in *Sigilai and another v Republic*.³²¹

315 [1906-08] 2 EALR 85.

316 [1906-1908] 2 EALR 105.

317 see also the case of *Republic v Kristofa Male and another* [1934] 1 EACA.

318 [1982] KLR 320.

319 see s 137 of the CPC.

320 Article 50

321 [2004] 2 KLR 480.

6.5.1 Statement of Offence

A count of a charge or information must commence with a statement describing the offence charged, called the statement of offence. The statement of offence should offer a brief description of the offence in ordinary language – avoiding as far as possible the use of technical terms. It is not necessary to put all the elements of the offence within the statement,³²² but courts have taken the view that where the offence charged is a technical one, they should be stated.³²³

If the offence charged is one created by a statutory enactment, it must contain a reference to the section of the enactment creating the offence.³²⁴ The correct procedure is to specify in the statement of the offence, not the section that defines the offence, but the one that prescribes the punishment thereof.³²⁵ In *Oremo v Republic*,³²⁶ a conviction was quashed where the accused was charged with a non-existent offence.

It is essential and imperative that the charge should clearly set out the offence as was stated by the Court in *Stephen Chege v Republic*.³²⁷

The court should see to it that the accused person fully understands the charge being read to him and to this end, the record should show that the offence with which an accused person is being charged has been fully explained to him with this requirement becoming more critical where the offences are serious ones. One way of ascertaining this is by ensuring that the charges are written out by the magistrate himself. In *Republic v George Samuel Sowe*,³²⁸ the Court said:

It would be preferable that the offences with which the accused is charged should be written out by the magistrate in all cases. Such a course should certainly be adopted in cases where a heavy sentence may be imposed.

As a measure to aid or increase clarity and banish confusion, the court suggested, quite properly in *Mwangi and another v Republic*,³²⁹ that it is desirable where different offences are committed to draft the charges in relation to those offences under separate and distinct paragraphs or counts so that the accused person knows precisely what he is to defend himself against.

322 s 137(a) of the CPC.

323 See *Tembere v Republic* (*infra*)

324 Sub-s (a)(i)&(ii). See the case of *Alwi v Republic* [1990] KLR 191.

325 Douglas B. (1964) *Criminal Procedure in Uganda Kenya* (Law in Africa) (No. 13) pp37. See also the case of *Cosma v Republic* [1955] 22 EACA 450

326 [1990] KLR 290.

327 [1983] Eklr.

328 14 KLR 172.

329 [1988] KLR 803.

6.5.2 Particulars of Offence

Particulars of the offence should be given. These also should be in ordinary language. Technical terms should be avoided.³³⁰ The essential ingredients of the alleged offence such as the date, place, time and circumstances in which it was committed must be stated.³³¹

In the case of *Tembere v Republic*,³³² the accused was charged with the offence of handling stolen property. The particulars of the charge merely stated that he handled. It did not state the nature of handling whether by receiving, retaining, etc and more importantly, it did not state that the possession or receipt was dishonest. The High Court held that the charge did not disclose the offence of handling stolen property and the facts stated did not contain all the elements of the offence. As a result, the accused did not validly plead guilty to the charge of handling.

In *Wilson v Republic*,³³³ it was held that the day to be stated in a charge of homicide should be the day in which the wrongful act was committed and not the date on which death occurred.

In the case of *Republic v Loibori*,³³⁴ the charge gave no particulars as to the place of the offence except to state that it occurred in the Northern Province of Tanganyika. It was held that a reference to what may be a vast territorial area can hardly be said to indicate to an accused person, with reasonable clearness, the place at which it is alleged he committed the offence.

Where there are two or more accused jointly charged, the Courts must frame the charges against each with sufficient particulars as to the part played by each accused: *Republic v Atanas s/o Mwamere*.³³⁵

6.5.3 Forms

The Second Schedule to the Criminal Procedure Code contains forms setting out the manner in which various offences should be charged as a guide to the manner in which offences should be stated in informations. The framing of charges should be in accordance with the said forms or forms conforming thereto as nearly as may be but the statement of the offence and particulars of offence may be varied according to the circumstances of each case.³³⁶

330 s 137 (a)(iii).

331 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13).

332 [1990] KLR 353.

333 [1955] 22 E.A.C.A. 372.

334 [1949] 16 E.A.C.A. 86.

335 [1960] KLR 17.

336 s 137 (a)(iv).

The use of the forms available in the Second Schedule is expressed in obligatory terms and any variation from the wording of these forms may be, in certain circumstances, fatal. Thus, for instance, the names of all accused persons should be given in full and not merely as, for example, “X and 6 Others.” This was the holding in *Republic v Yonasani Egalo and others*.³³⁷

6.5.4 Counts

When more than one offence is charged in a charge sheet or information, a description of each offence so charged must be set out in a separate paragraph of the charge or information. Each of these paragraphs is called a *count*.³³⁸

Where a charge or information contains more than one count, the counts must be numbered consecutively.³³⁹

It is unnecessary, in a count charging a statutory offence, to negative any exception or exemption from, or qualifications to, the operation of the enactment creating the offence.³⁴⁰

In *Mwaitige v Republic*,³⁴¹ the appellant was charged on four counts with illegally selling over five tons of coffee to a dealer. The charge set out in a single statement brief particulars of the alleged statutory offence alleging a contravention of a certain Agricultural Order, followed by particulars of the four counts in succession. This was set out in detail followed by particulars of the four occasions on which it was alleged that the order had been contravened. The four separate sets of particulars in the counts were not preceded by statements of the offence. This was held by the Court of Appeal to have been irregular as each count is a distinct offence and should contain a statement of the offence of its own.

6.6 DUPLICITY

Any count that charges within it more than one specific offence is said to be bad for *duplicity*. It is also said to be *duplex*.³⁴² It is a fundamental mistake and not normally curable.³⁴³ The reason for this is that when a charge is duplex and an accused person goes through a trial, the fairness of the process is fundamentally compromised as it is not clear to him what the exact charges that confront him

337 9 EACA 65.

338 s 135(2) of the CPC.

339 *Ibid*, sub-s(a)(v).

340 *Ibid*, s 137(b)(ii).

341 [1961] E.A. 470.

342 See also *Kasyoka v Republic* [2003] KLR 406.

343 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13) pp 38.

Charges and Informations

are. As a result, he may not be able to prepare a proper defence and this is clearly prejudicial and may amount to a failure of justice.

In the case of *Laban Koti v Republic*,³⁴⁴ the Court held that in deciding whether there is duplicity in a charge, the test is whether a failure of justice has occurred or the accused has been prejudiced.

In *Omboga v Republic*,³⁴⁵ the court held that injustice will be occasioned where evidence is called relating to many separate acts all contained in one count because the accused cannot possibly know what offence exactly he is charged with.

In the case of *Saina v Republic*,³⁴⁶ the accused person faced a single count of house breaking, theft and handling stolen property. On appeal, the High Court was of the view that that charge was an incurable illegality.

The Court in *Republic v Sowedi Kauta*³⁴⁷ held that a charge alleging the murder of two persons in one count was bad in law. There should have been two separate counts.

In the case of *Republic v Mongella*,³⁴⁸ the accused person was convicted of the murder of six persons by wilfully setting fire on the hut in which they were asleep. The charge of murdering the six was laid in a single count. It was held that he should have been charged with six separate counts.

In the case of *Nzioka v Republic*,³⁴⁹ the appellant was convicted and sentenced for the offence of causing death by dangerous driving. Part of the charge read:

“...drove the said vehicle on the said road recklessly and at a speed or in a manner which was dangerous to the public.”

On appeal it was argued that the charge was bad for duplicity, in that, whereas the relevant position of law created several offences, it was not specified which one the appellant had committed. The court held that it is a paramount requirement of justice that an accused person must know precisely what he is charged with and where a statutory provision creates more than one offence in a section, the proper and safe method of preferring a charge under such an enactment is under

344 [1962] E.A. 439.

345 [1983] KLR 340.

346 [1974] EA 83.

347 [1933] 13 K.L.R. 105.

348 [1934] 1 E.A.C.A. 152.

349 [1987] KLR 613.

separate counts. The charge in this case made no sense in that by the use of the word “and” in its particulars, it conjoined two methods of committing the offence under the Traffic Act (Cap 403 Laws of Kenya) while the third method was disjoined in the particulars by the use of the word “or” all the while charging the three method under one count.

In contrast to the above line of cases, the court in *Mwangi v Republic*,³⁵⁰ dealt with a situation where the accused was charged with being in possession of fire arms and ammunition in the same count. The Court found it not to be bad for duplicity because the two offences were so intimately linked to each other that they could not be separated.

6.7 OVERLOADED CHARGES

A charge is said to be overloaded when multifarious counts are brought against an accused person involving different aspects of the Criminal Law as was stated in the case of *Kinyanjui v Republic*.³⁵¹

The test to be applied to determine whether a charge is overloaded is whether or not the counts preferred against the accused person prejudice or embarrass him in the presentation of his defence by their sheer numerosity.

A case on point is *Ochieng' v Republic*³⁵² where the accused was charged with 44 counts of motley offences. He was acquitted of a few and convicted of the rest. At the High Court where he first appealed he was acquitted of two more counts and his conviction in respect of the rest affirmed. He appealed again. The Court of Appeal held that it was undesirable to charge the accused with so many offences on the same charge sheet, as it may occasion prejudice or embarrassment. It went on to state that there should be no more than twelve counts on the same charge.

Where a person is charged with too many counts on the same charge sheet, the prosecution should elect the counts it prefers to deal with at a particular trial. It may also exercise its discretion under section 87(a) of the Criminal Procedure Code and withdraw the extra charges. The person is then discharged in respect of the withdrawn charges but can be charged again at a later date.

Further, as the Court suggested in the case of *Ganzi and 2 others v Republic*³⁵³ that where a person faces a number of capital charges in the same information, it is preferable to proceed with one only of the charges and leave the rest in abeyance

350 [1974] EA 108.

351 [2004] 2 KLR 364

352 High Court Criminal Appeal No. 10 of 1985

353 6 ULR 161.

Charges and Informations

even if the charges appear inter-linked. When the prosecution decides to proceed with all the charges simultaneously, and a person has been convicted of several capital charges, it is a good practise to pass the sentence of death on one count only and leave the sentences in other charges in abeyance.³⁵⁴ The reason for this, obviously, is that a convict cannot suffer death more than once.

6.7.1 Statutory Offences

Where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.³⁵⁵

6.7.2 Alternative Charges

Where the exact acts or omissions with which an accused person is charged may constitute more than one offence, it is permissible, even advisable, that the offences be laid in the alternative as opposed to consecutively or cumulatively.

In *Cosma v Republic*,³⁵⁶ the appellant was convicted on four counts:

- a) Conversion of a motor car, not amounting to theft,
- b) Robbery with violence,
- c) Assault occasioning bodily harm on person X,
- d) Assault occasioning bodily harm on person Y

The appellant and others had broken into a house and shop and had stolen property. In the course of the burglary, violence was done to two persons and this formed the subject matter of counts (c) and (d) as well as being the subject of the particulars given in count (b). The prosecution agreed that counts (c) and (d) were in fact alternative to count (b) although this was not stated in the charge. The Court of Appeal held that:

- i. The counts can and should be laid in the alternative in appropriate cases, and;
- ii. That, subject to rules of misjoinder of charges, any number of counts may be laid.

³⁵⁴ See also the case of *Duncan Wahome Wamae v Republic* High Court Criminal Appeal No. 350 of 1968.

³⁵⁵ s 137(b)(i) of the CPC.

³⁵⁶ [1955] 22 E.A.C.A. 450.

Where charges are preferred against an accused person in the alternative, a conviction should be entered on one only and that no finding should be made on the alternative count. In *Republic v Nasa Ginnars Ltd.*,³⁵⁷ the magistrate convicted the accused on one count and acquitted him on the alternative. It was held that a more proper course would have been to make no finding on the alternative count.³⁵⁸

6.7.3 Description of Property

The description of property in a charge or information must be in ordinary language, and must indicate with reasonable clarity the property referred to, and once so described, it is unnecessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.³⁵⁹

In the case of *Evans Masese Mose v Republic*,³⁶⁰ the Court said that where the property in the charge or information was not described, such omission was fatal to the entire charge and the subsequent conviction and sentence.

Where the property is vested in more than one person, and the owners of the property are referred to in a charge or information, it is sufficient to describe the property as owned by one of those persons by name with the others; and if the persons owning the property are a body of persons with a collective name, such as a joint stock company or “Inhabitants”, “Trustees”, “Commissioners” or “Club” or other similar name, it shall be sufficient to use the collective name without naming any individual.³⁶¹

Property belonging to or provided for the use of a public establishment, service or department may be described as the property of the Government.³⁶²

Coin, bank notes and currency notes may be described as money. An allegation as to money, so far as regards the description of the property, must be sustained by proof of the amount and not the specific denomination. In cases of

357 [1955] 22 EACA 434.

358 see also *Mbithi and others v Republic* [1955] 22 EACA 484.

359 s 137 (c)(i).

360 [1955] EACA 484.

361 Sub-s(c)(ii).

362 Sub-s(c)(iii).

stealing and defrauding by false pretences, it is sufficient proof that the accused person dishonestly appropriated or obtained the amount of money alleged notwithstanding that it was part of a larger amount which he may have returned to or delivered on behalf of the person who gave it to him.³⁶³

6.7.4 Description of Persons

The description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, must be reasonably sufficient to identify him. It is not necessary to state his correct name, abode, style, degree or occupation; and if the name of the person is not known, or for any other reason, it is impracticable to give such a description or designation, it is enough to give such details as are reasonably practicable in the circumstances or to refer to him as “a person unknown.”³⁶⁴

6.7.5 Description of Document

Where it is necessary to refer to a document or instrument in a charge or information, it must be described by any name or designation by which it is usually known, or by the purport thereof, without setting out a copy.³⁶⁵

6.7.6 General rule as to Description

It is sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language, so as to indicate with reasonable clearness, what is being described.³⁶⁶

6.7.7 Statement of Intent

Where the statute creating an offence does not make intent an essential ingredient thereof, it is unnecessary to state intent to defraud, deceive, injure or such other intent in the charge.³⁶⁷

6.7.8 Mode of charging previous convictions

Where a previous conviction of an offence is charged in a charge or information, it shall be charged at the end of the charge or information by means of a statement that the accused person has been previously convicted of that offence at a certain time and place without stating the particulars of the previous offence.³⁶⁸

363 Sub-s(c)(iv).

364 Sub-s(d).

365 s 137(e).

366 s 137(f).

367 s 137(g).

368 s 137(h).

6.7.9 Use of Figures and Abbreviations

Figures and abbreviations may be used for expressing anything which is commonly expressed in such manner.³⁶⁹

6.7.10 Gross Sum in cases of Stealing

When persons employed in the public service, clerks and servants, directors or officers of companies as well as agents are charged with the offence of stealing,³⁷⁰ it shall suffice to specify the gross amount of the property in question and the dates between which it is alleged to have been stolen without specifying particular times or exact dates.³⁷¹

6.8 DEFECTIVE CHARGES

Every objection to information by reason of a formal defect on the face thereof shall be taken immediately after the information has been read over to the accused person and not later.³⁷² Even then, once the rules for framing of charges have been generally observed, the charge or information should not be open to objection in respect of its form or contents.³⁷³

The general rule is that no objections are allowed in case of any defect in form as far as charges are concerned. In fact, section 90(2) of the Criminal Procedure Code states that the validity of proceedings undertaken in pursuance of a complaint or charge shall not be affected either by a defect in the complaint or charge or by the fact that a summons or warrant was issued without a complaint or charge. A defect in a charge does not lead to the quashing of an accused person's conviction or order unless the defect has occasioned a failure of justice or has prejudiced the accused.

It would appear, then, that as a general rule, objections to charges are more likely than not to fail unless they are based on the ground that the formal charge or information as framed does not disclose an offence so that the magistrate is invited not to admit the same under section 89(5) of the Code.

369 s 137 (i) CPC.

370 Under ss 280–283 of the Penal Code Cap 63.

371 *Supra* nt 303, s 137 (j).

372 *Ibid*, s 275 (1).

373 *Ibid*, s 137.

Charges and Informations

However, in the case of *William Dubi Ikiwo v Republic*,³⁷⁴ the appellant was charged with two offences under section 105 (b) of the Penal Code. The charge sheet read that he was charged with the offence of personating a police officer contrary to section 105 (d) of the Penal Code. The quoted provision deals with persons who falsely represent themselves to be employed in the public service, and assume to do any act or attend any place for the purpose of doing any act under the purported employment. The Court noted that the offence the accused was charged with did not exist. There was no amendment to the charge. Hence the Court held that the appellant had been tried and convicted for non – existent offence and proceeded to quash the conviction.³⁷⁵

Much as the position taken in *Ikiwo* appears drastic, it is nonetheless correct since, as was stated in *Sigilai and another v Republic*,³⁷⁶ a court may not, on its own motion, decide that the omissions made in a charge sheet are remediable by taking judicial notice of the omitted matters.

It is not every defect or omission, however, that defeats a charge and it has been held on many occasions, including in *Alwi v Republic*,³⁷⁷ that a mere technical defect in the charge sheet which is not fundamental and does not cause a failure of justice is curable.³⁷⁸

The paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge. This was the holding in *Kilome v Republic*.³⁷⁹

6.9 AMENDMENT OF CHARGES

Where, at any stage of a trial before the close of the case for the prosecution, it appears to the Court that the charge is defective, either in substance or in form, the Court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the Court thinks necessary to meet the circumstances of the case.³⁸⁰

374 [2001] eKLR (Criminal Appeal No. 547 of 2001) .

375 See also the case of *Buru v Republic* [2005] 2 KLR 533.

376 [2004] 2KLR 480.

377 [1990] KLR 188.

378 See also the case of *Muchiri v Republic* [1990] KLR 337.

379 [1990] KLR 194.

380 s 214(1) of the CPC.

Essentials of Criminal Procedure in Kenya

The Court of Appeal in *Maina v Republic*³⁸¹ was doubtful as to whether any amendment of a charge other than the correction of a mere matter of form should ever be allowed after an accused has begun to give evidence.

Where a charge is so altered, the Court must call upon the accused person to plead to the altered charge.³⁸² The accused has a right to demand that any or all the witnesses who had already testified be recalled and give their evidence afresh or be further cross-examined by him or his advocate, and the prosecution has the right to re-examine such witness on matters arising out of further cross-examination.³⁸³

In *Mohammed Bashir v Republic*,³⁸⁴ the appellant was charged with attempted murder, disobedience of lawful orders, threatening injury to a public servant and obstructing a Produce Inspector in the course of his duty. All the charges were defective in that they contained no particulars of the offences charged. The magistrate started the hearing but at some point changed the murder charge to that of assault. The fourth charge was withdrawn. The accused was convicted of the three remaining charges but had not been asked to plead to the charge of assault. The High Court declared the trial a nullity.

Any variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.³⁸⁵ In the case of *Diego v Republic*,³⁸⁶ the Court held that the charge need not have named the names of the persons who it was alleged intended to commit treason as it was sufficient for the prosecution to prove that some other members intended to commit treason.

Where an alteration of a charge is made and there is a variance between the charge and the evidence, the Court must, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.³⁸⁷ This is meant to protect the interest of the accused person by affording him more time to make full and proper preparation of his defence in

381 [1954] 21 EACA 252.

382 *Supra* nt 319, s 214(1)(i) See the case of *William Sebugenyi v Republic* [1959] E.A.411.

383 *Ibid*, s 214(1)(ii).

384 [1950] 24 K.L.R. 88.

385 *Supra* nt 322, s 214(2) See the case of *Kithome v Republic* [2005] 2 KLR 170.

386 [1985] KLR 621.

387 s 214(3) of the CPC.

light of the amendment or alteration.

Where an information is amended, a note of the order for amendment must be endorsed on the information, and the information will be treated for the purposes of all proceedings in connexion therewith as having been filed in the amended form.³⁸⁸ Thus, where, as happened in the case of *Republic v Samuel Chepkonga*,³⁸⁹ the prosecutor alters the charge by filing a substituted charge sheet containing only one accused person where the original one had six, that substitution effectively meant that the prosecution had dropped the charges against the omitted accused persons.

6.10 QUASHING CHARGE OR INFORMATION

If an information does not state, and cannot by amendment be made to state an offence of which the accused has had notice, it shall be quashed either on a motion made before the accused pleads or on a motion made in arrest of judgment. A written statement of every such motion must be delivered to the Registrar or other officer of the Court by or on behalf of the accused and shall be entered upon the record.³⁹⁰ It is an open question whether in view of its location in the Criminal Procedure Code and reference to being delivered to the Registrar, such a motion is available to the subordinate court or limited only to the High Court.

388 s 275 (3) of the CPC.

389 Anti-Corruption case No 16 of 2003 (unreported).

390 s 276 of the CPC.

CHAPTER SEVEN

PLEAS

7.1 TAKING A PLEA

Once an accused person has appeared or been brought to court under arrest, the next step is for him to be informed of and be called upon to answer the criminal charges preferred against him. This process is known as *arraignment*.

The charge is read over to him in open court complete with the statement of offence and the particulars of each count to which he is required to respond. This is referred to as *taking a plea*.

7.2 POSSIBLE PLEAS

In answer to a charge, an accused person may:³⁹¹

1. Plead Guilty
2. Plead Not Guilty
3. Say nothing: i.e. refuse to plead, assuming that he understands the proceedings
4. Plead:
 - a) *autrefois acquit*
 - b) *autrefois convict*, or
 - c) pardon
5. Say that the Court has no jurisdiction over him
6. Plead guilty subject to a plea agreement

If the accused pleads that he has been previously convicted or acquitted on the same facts of the same offence; or that he has obtained the President's pardon for his offence, the Court must first conduct a *voir dire*, and if the Court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused will be required to plead to the charge.³⁹²

7.3 RECORDING PLEAS

The substance of the charge must be stated to the accused person by the Court, and he must be asked whether he admits or denies the truth of the charge.³⁹³

The charge should be explained and interpreted to the accused person. Save in

391 Criminal Procedure in Kenya and Uganda, Law in Africa (Number 13, 1964) pp 57.

392 s 207(5) of the CPC.

393 *Ibid*, s 207(1).

Essentials of Criminal Procedure in Kenya

simple and straight forward charges, it is not proper for the magistrate to delegate this duty to the Court Clerk and even for simple charges, they must be read under the direction of the Court.³⁹⁴ It is a fatal omission not to explain to the accused person all the ingredients of a charge: *Charo v Republic*.³⁹⁵

Where the accused person does not understand the language of the court, it is mandatory that an interpreter be availed to translate the charge and the proceedings for the benefit of the accused and the court. Such interpreter must first be sworn to faithfully and accurately discharge the task and this should be reflected on the record. In *Republic v Abdi Ali*,³⁹⁶ the Court said that a plea taken through an unofficial unsworn interpreter cannot be regarded as unequivocal.³⁹⁷

The accused person should plead personally and not through his advocate. This was the holding in *Ganji v Republic*.³⁹⁸ It is only in situations where a statute allows an advocate to plead on his client's behalf, such as in cases involving minor traffic infractions that this rule is qualified.

The plea should be recorded as nearly as possible in the accused person's own words: *Wamithandi v Republic*.³⁹⁹

In *Republic v Yonasani Egalu and others*,⁴⁰⁰ the Court said that it is most desirable that not only every constituent of the charge be explained to the accused person, but that he should be required to admit or deny every constituent part thereof and that what he says should be recorded in a form which would satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally.

7.4 PROCEDURE IN RECORDING A PLEA OF GUILTY

Whereas there is absolutely no reason why the Court should not accept a plea of guilty from an accused person, the consequences of it, in particular the fact that the accused thereby forfeits his right to a trial whereby he can confront his accusers and challenge the evidence against him, counsels caution and circumspection in the manner in which such pleas are taken.

394 Bench Book for Magistrates In Criminal Proceedings.

395 [1982] KLR 308.

396 21 (2) K.L.R. 116.

397 See also *Alui v Republic* [1990] KLR 191.

398 [1910-20] 2 ULR 101.

399 3 EALR 101.

400 [1965] 9 EACA 65.

Pleas

The requirements for a plea of guilty were codified by the Court of Appeal in the case of *Adan v Republic*⁴⁰¹ and have since been universally followed by the courts. Courts have always been concerned that before a plea of guilty is accepted and acted upon, certain vital safeguards must be strictly complied with namely:

- i. The person pleading guilty fully understands the offence with which he is charged.
The court taking the plea of guilty must in its record show that the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that, with that understanding and out of his own free will, the pleader admits the charge. This requirement applies not only to offences punishable by death but to all offences.
In *Ngigi v Republic*,⁴⁰² it was further held by the High Court that the accused should be required to admit or deny every element of the charge unequivocally.
- ii. Where the offence is one punishable by death, the court recording the plea of guilty must show in its record that the person pleading guilty understands the consequences of his plea.
- iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and a change of plea entered;
- v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

In the case of *Kariuki v Republic*,⁴⁰³ where four accused persons were charged jointly, their responses to the facts of the offence were recorded as follows:

“Accused 1- Story is correct

Accused 2- Do

Accused 3- Do

Accused 4- Do

Court- Plea of guilty entered by all”

The Court of Appeal said that the word ‘do’ recorded by the trial Court as the accused persons’ answer to the charge meant nothing and was neither an admission nor a denial of the facts.

401 [1973] EA 45.

402 [1987] KLR 98.

403 [1984] KLR 809.

Essentials of Criminal Procedure in Kenya

The Court proceeded to provide an outline of the manner in which a plea of guilty is to be recorded, as follows:

- i. The trial magistrate or judge must read and explain to the accused the charge and all the ingredients of the offence, in the language of the accused or a language the accused understands.
- ii. He should then record the plea in the accused person's own words and if they are an admission, a plea of 'guilty' should be entered.
- iii. The prosecution must then, immediately, state the facts and the accused should be given an opportunity to dispute, to explain or to add any relevant facts.
- iv. If the accused does NOT agree to the facts or raises any question to the facts, his answers should be recorded and a change of plea entered. If there is no change of plea, a conviction should be recorded alongside a statement of facts relevant as well as the reply of the accused.

In the case of *Republic v B.M. Patel*,⁴⁰⁴ the Court said that it is not desirable that a plea of guilty should be accepted where the plea contains no other word than "Guilty" in cases where the accused may not have understood exactly the ingredients of the charge.

In *Njuki v Republic*,⁴⁰⁵ the High Court stated, "It has been said time and again that the pleas recorded in the words such as 'I admit,' 'I accept it,' 'I plead guilty,' 'It is true,' 'I am guilty' and so on cannot be considered as unequivocal pleas."

The plea must be free and voluntary. It is inappropriate for the judge or magistrate to advise an accused person as to whether to plead guilty or not guilty. His function is only to explain the charge and make sure the accused understands it.⁴⁰⁶

In *Olel v Republic*,⁴⁰⁷ the High Court stated that if a plea of guilty is not voluntary or is obtained by force or threats or torture or even deception, it cannot be said to be unequivocal. It would, in these circumstances be a nullity.

In both *Chacha v Republic*⁴⁰⁸ and *Mangwera v Republic*,⁴⁰⁹ the former Court of Appeal of East Africa held that there is no statutory provision invalidating a conviction on a capital charge on an accused person's own plea where it does amount to an unequivocal admission of guilt but advised caution and went on to

404 [1985] K.L.R. 22.

405 [1990] KLR 334.

406 Law in Africa No 13 Criminal Procedure in Uganda and Kenya.

407 [1989] KLR 444.

408 [1953] 20 EACA 339.

409 [1952] 18 EACA 150.

Pleas

say that it is generally inadvisable for the trial judge to accept a plea of guilty on a capital charge.⁴¹⁰

There is merit in the view that the more serious the charge the greater the caution exercised by the Courts in accepting a plea of guilty.⁴¹¹ As such, rarely is a plea of guilty acceptable in a capital charge but if the court is satisfied that the plea is free, voluntary, informed and unequivocal, there is no constitutional, doctrinal or other bar to its being entered.

In the case of *Boit v Republic*,⁴¹² the Court stated that there is no law in Kenya which would prevent a person charged with an offence punishable by death from pleading guilty to such a charge. That being so, the Courts have always been concerned that before a plea of guilty to such a charge is accepted and acted upon, certain vital safeguards must be complied with and it must appear on the record of the Court taking the plea that those safeguards have been strictly complied with. These safeguards are:

- a. As with all other offences, the person pleading guilty must fully understand the offence with which he is charged as provided for under the Constitution. The person should be told in detail and in a language familiar to him the substance of the offence; the elements or ingredients which constitute it, the date and the approximate time on which the offence was committed and the person against whom the offence was committed.
- b. Where the offence is one punishable by death, the Court recording the plea must show in its record that the person pleading guilty understands that as a consequence of his plea he will face a sentence of death.

If an accused person is fully informed of all these matters, and in particular is cautioned that by pleading guilty he forfeits the right to a trial and that the offence attracts a mandatory penalty of death but has nevertheless chosen to plead guilty, then there cannot be any genuine complaint thereafter.

In *Onkoba v Republic*,⁴¹³ the appellant pleaded guilty to the first count of robbery with violence. The learned Principal Magistrate pointed out to him that there was a mandatory sentence of death, and he said that he understood, and still wished to plead guilty. The matter was adjourned and on the date of adjournment the Principal Magistrate again asked the appellant if he realized that the death

410 See also *Ndede v Republic* [1991] KLR 567.

411 *Supra* nt 356 pp 56.

412 [2002]1 KLR 815.

413 [1989] KLR 395.

Essentials of Criminal Procedure in Kenya

sentence was mandatory, and whether he wished to maintain a plea of guilty. The appellant said that he did.

He was taken to hospital for mental examination and was found to be mentally alert and fit. Facts were given by the prosecutor after which the appellant said that he understood them and that they were true but went on to tell the court he wished to get his wife back but ended up killing another girl who had stood in his way. The magistrate entered a plea of not guilty in those circumstances and fixed the matter for hearing. During the mention of the case the appellant came to court and said, in English, that he still wished to admit to the offence of robbery. The court reminded him about the intention he had informed the court he had of committing the first offence. He disputed saying that he actually intended to rob the girl he had killed. The court reminded him that if there was a conviction he would be sentenced to death and the appellant said that he understood. The learned magistrate in his notes on sentence said that:

The accused has pleaded guilty to the offence despite my warning that he would be sentenced to death. He has persisted in wanting to plead guilty. Can the court refuse him from doing so when he himself wants to and fully knows that he has been adequately warned about the consequences that flow on him after being convicted? . . . I sentence the accused to suffer death as is provided for by law.

The appellant appealed on the ground, *inter alia*, that he did not know what was going on in court. The High Court held that the plea was unequivocal, and from the record, it suspected that the trial magistrate would have liked to direct a plea of not guilty if only he could find a way to do so. The record showed that he had made every possible enquiry advised by relevant case law, and the replies of the appellant left him no way out whatever. The appeal was dismissed.⁴¹⁴

In *Baya v Republic*,⁴¹⁵ the two appellants were initially charged with murder. This was later reduced to manslaughter. The first appellant pleaded to the new charges saying, “We killed him but that was not intentional.” After this it appeared from the record of the case that the trial court entered a plea of guilty to the charge for both accused persons. On appeal the Court of Appeal held that the charge and all its essential ingredients must be explained to the accused in his vernacular or some other language that he understands and the accused person’s own words in reply should be correctly translated into English and then carefully recorded. If the words are an admission, a plea of guilty should be recorded.

⁴¹⁴ See also *Olel v Republic* [1989] KLR 444.

⁴¹⁵ [1984] KLR 657.

Pleas

Where a plea of guilty is entered on behalf of an accused person who is represented during the proceedings, both the trial and the appellate courts will more readily presume that the said plea was voluntary, unequivocal and well advised. This was demonstrated in the case of *Nyanchuma v Republic*,⁴¹⁶ where the accused person, a 16 year old, was charged with the offence of murder in the High Court. He pleaded “Charge is true” to a lesser charge of manslaughter. The plea was recorded and the particulars of the offence read. Although he admitted the particulars, there were material contradictions therein as to the date when the offence actually took place. After mitigation he was sentenced to detention at presidential pleasure. He appealed claiming that the plea taking was irregular, and that the contradictions in the particulars of the charge rendered the conviction a nullity. In the alternative the appellant attacked the sentence, saying that it was wrongly given on the assumption that the deceased had been convicted of a capital offence. On appeal, the court held that the accused having been represented by counsel, his plea was unequivocal. He did not have a defence to the charge. Hence the irregularities in taking of the plea and contradictions in the particulars were irregularities in form that did not go into the substance and were therefore curable under section 382 of the Criminal Procedure Code.

Once an accused person pleads guilty, the prosecutor is required to state the facts upon which the charge is based. It is not enough for the prosecutor to state “facts as per charge sheet.” The statement of facts must be explained to the accused: *Ombena v Republic*.⁴¹⁷

Similarly, the use of short cuts and abbreviations in the recording of the proceedings and in particular the words spoken are unacceptable. A case in point is *Catherine Nkerote v Republic*.⁴¹⁸ There, the accused was found with 30 litres of *Mugacha*.⁴¹⁹ Before the plea was entered, the magistrate wrote, “CRO and E.” The learned judge in this appeal refused to accept the abbreviations, supposedly an acronym for “Charge Read Over and Explained,” saying that:

It is not acceptable in judicial proceedings, where individual rights and liberty are at stake, to take shortcuts. It is not sufficient for the prosecutor to state and for the magistrate to accept that facts are per the charge sheet because charges do not normally contain facts but particulars of the offences.

416 [2004]1 EA 261.

417 [1981] KLR 450.

418 High Court Criminal Appeal No. 166 of 2006.

419 illicit brew.

Essentials of Criminal Procedure in Kenya

Even where an accused person accepts the facts stated by the prosecution as true, the court is under a duty to satisfy itself that such admission amounts to an unequivocal admission of the offence charged.

In *Kisivi v Republic*,⁴²⁰ the appellant was charged and convicted of stealing livestock and sentenced to four years imprisonment with corporal punishment. The appellant was recorded as having said “Yes it is true” to the facts which were read by the prosecution. The accused was recorded as the one who locked the shed from which the cattle was subsequently stolen before being found in the compound of one Dzuya. There was no evidence linking the accused with the movement of the animals to Dzuya’s compound. On appeal, the Court said that the prosecution did not in any way demonstrate how the appellant was connected with the animals which were recovered. It said that unless the magistrate elicits and gets enough detail of what happened and how the accused before him was connected with the offence charged, it is likely that the plea will not be unequivocal.

The Court should also be satisfied that the accused wishes to admit, without any qualification, each and every ingredient of the offence charged: *Lusiit v Republic*.⁴²¹ If so satisfied, the Court is to record that the accused has been convicted on his or her own plea of guilty.

The general rule⁴²² is that no appeal is allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea, except as to the extent or legality of his sentence. However in the case of *Ndede v Republic*,⁴²³ the Court said that it has inherent and/or residual powers to entertain appeals against guilty pleas where the proceedings are found to be a nullity:

- a) Because a plea of guilty has been entered as a result of undue pressure⁴²⁴
- b) Where there was doubt as to whether the accused had complete freedom of choice whether to plead guilty or not guilty⁴²⁵
- c) Where there has not been a free plea because the plea has been made under threats or pressure from the Court⁴²⁶
- d) Where an accused has pleaded guilty to an offence that does not, in fact exist or the facts do not disclose any offence.

420 [1991] KLR 125.

421 [1977] KLR 143.

422 See ss 348 & 379(3) of the CPC.

423 [1991] KLR 567 See also *Olé v Republic* [1989] KLR 444.

424 *R v King* [1920] 15 Cr App R 13.

425 *R v Turner* [1970] 54 Cr App 2352.

426 *R v Inns* [1974] 60 Cr App R 231.

Pleas

In all these cases referred to by the Court of Appeal, the conviction founded on a plea of guilty was quashed in exercise of the Court's inherent jurisdiction and either a fresh trial ordered or the Court itself dealt with the matter with finality.

The Court went further to state that where, as happened in the instant case, at the time of taking the plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to Court from the date of arrest, then an explanation as to the circumstance must form an integral part of the facts to be stated by the prosecution to the court. The court should then put that explanation to the accused and inquire of him if it affects his plea. In the current case the learned judge had erred in making a finding on the issue of voluntariness of the appellant's plea without considering any evidence thereon and occasioned a miscarriage of justice to the appellant. The appeal was allowed.

As already seen, after a plea of guilty has been entered and the accused has been convicted on his own plea, the court will pass sentence or make an order against him. Before doing so, however, the court may permit, or in fact require the complainant to give an outline found in the charges. The prosecution, in giving the said outline, is under a duty not to embellish or exaggerate. Thus in *Ndabi v Republic*,⁴²⁷ the High Court stated that it is improper for a prosecutor, after conviction and before sentence, to make any statement to the court against the convict, which if challenged he would be unable to prove by legally admissible evidence. Thus under section 207 of the Criminal Procedure Code, the prosecutor is restricted to facts upon which a charge is founded.

7.5 PLEA OF GUILTY IN THE ABSENCE OF THE ACCUSED

The trial of an accused person should take place in his presence.⁴²⁸

In the case of *Narotthands Vithlam v Republic*,⁴²⁹ the Court held that a trial held, even partly, in the absence of the accused person is a nullity. However, if the accused conducts himself in such a way as to render continuation of the trial in his or her presence impossible, such accused person may be removed from Court and the trial may proceed in his or her absence.⁴³⁰

427 [1987] KLR 304.

428 Article 50(2) of the Constitution.

429 [1957] E.A. 343.

430 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi Kenya pp 26.

In some minor offences, the personal attendance of the accused may be dispensed with. If the offence involved is not a felony and is punishable only by a fine or by imprisonment not exceeding a period of three months, or both, and there is reason to do so, the Court may dispense with the personal attendance of the accused if he pleads guilty in writing or if he appears by advocate.⁴³¹

And in *Manager, Tank Building Contractors v Republic*,⁴³² the Court said that before the advocate can plead guilty for the client, the issue of the appearance of the accused should be dispensed with first.

7.6 PROCEDURE ON THE PLEA OF NOT GUILTY

The Court enters a plea of Not Guilty where:⁴³³

1. The accused does not admit the charge
2. The accused does not admit the statement of facts
3. The accused refuses to plead

If an accused person does not admit the truth of the charge, the Court proceeds to hear the complainant and his witnesses and other evidence (if any).⁴³⁴

The accused person or his advocate may put questions to each witness produced against him.

Where an accused person in an answer to a charge at his arraignment makes an inculpatory statement, that is to say one that does or tends to suggest that he is guilty of an offence, even as he pleads not guilty, such a statement should not be used against him when the court considers the case.⁴³⁵

7.7 REFUSAL TO TAKE A PLEA

7.7.1 In the High Court

If an accused person arraigned upon information stands mute of malice, or neither will nor by reason of infirmity can, answer directly to the information, the Court may order the Registrar or other officer of the Court to enter a plea of “not

431 *Ibid* pp 27.

432 [1968] EA 143.

433 *Supra* nt 357 pp 27.

434 *Ibid*, s 207(3) .

435 *Republic v Atanas* 17 KLR 50.

Pleas

guilty” on behalf of the accused person. A plea so entered has the same force and effect as if the accused person had actually pleaded it.

The Court may also proceed to try whether the accused person is of sound or unsound mind, and, if he is found of sound mind, it proceeds with the trial. If he is found of unsound mind, and consequently incapable of making his defence, the Court shall order the trial to be postponed and the accused person to be kept meanwhile in safe custody in such place and manner as the Court thinks fit, and shall report the case for the order of the President.⁴³⁶

7.7.2 In Subordinate Courts

If the accused person refuses to plead, the Court shall order a plea of “not guilty” to be entered for him.⁴³⁷

In *Wachira and others v Republic*,⁴³⁸ when charged, the accused person refused to plead. He proceeded to create uproarious raucous in Court raising doubts as to his sanity. After medical examination, a psychiatrist gave evidence that the accused person was mentally normal and was merely simulating disease of the mind. The accused continued to cause disturbance such that it was not possible for the trial to be conducted in his presence. A plea of not guilty was entered, the accused was removed and most of the trial took place in his absence. The Court of Appeal held that the course adopted by the trial court was strictly correct.

7.8 PLEAS OF SEVERAL ACCUSED

Where there are two or more accused persons each accused person pleads separately to the charge or charges. The plea of each accused person should be recorded separately and as far as possible exactly in his or her own words.⁴³⁹

It appears largely to be a matter of discretion for the magistrate to convict the person who has pleaded guilty before hearing the case of the others who pleaded not guilty.

In *Karuma Bukenya v Republic*,⁴⁴⁰ the Court said that where an accused pleads guilty, and he is convicted, it is desirable that he be sentenced before the court

436 s 28(1) of the CPC.

437 s 207 (4) of the CPC.

438 [1956] 23 EACA 562.

439 *Harrison Muli Muliti and another v Republic* Criminal Appeal No 57 of 1986, (unreported) see also the case of *Baya v Republic* [1984] KLR 657.

440 [1952] 19 EACA 23.

proceeds with the trial of his co-accused and calling him as a witness. There can then be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence.

However, as was held in *Mutuku v Republic*,⁴⁴¹ failure to do so is a curable defect and there may be merit in postponing the sentence in order to hear a full account of the incident⁴⁴² and thereby arrive at a more just decision in the matter of sentencing.

This is the approach of English courts. It was laid down by the Court of Criminal Appeal in *Republic v Payne*⁴⁴³ that where there are two or more accused persons and one of them pleads guilty, he should not be sentenced until the trial of the others is concluded, when the position of the accused person can be considered and their relative degrees of guilt assessed for the purpose of sentence.

7.9 PLEAS TO SEVERAL CHARGES AGAINST AN ACCUSED

Where the accused is charged with more than one count, the Court should record a plea on each count separately.⁴⁴⁴ The aim is to ensure that if there is a plea of guilty, the same is unequivocal.

7.10 GENERAL PROVISIONS RELATING TO THE PLEAS OF *AUTREFOIS ACQUIT* AND *AUTREFOIS CONVICT*

A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of that offence, while the conviction or acquittal has not been reversed or set aside, is not liable to be tried again on the same facts for the same offence.⁴⁴⁵

However, such convicted or acquitted person may afterwards be tried for another offence:

- a. with which he might have been charged on the former trial under section 135 (1) of the Criminal Procedure Code.⁴⁴⁶ Such offence, whether a felony or misdemeanour, is one which might have been charged together in the former

441 [1982] KLR 313.

442 Law in Africa No. 13: Criminal Procedure in Kenya and Uganda.

443 [1950] 1 All E.R. 102; 34 Cr App R 43.

444 *Ombena v Republic* [1981] KLR 450.

445 s 138 of the CPC.

446 *Ibid*, s 139.

Pleas

- information having been founded on the same facts, or formed or was part of a series of offences of the same or a similar character.⁴⁴⁷
- b. causing consequences which constitute a different offence from that for which he was convicted or acquitted. Such a person may be afterwards tried for the last-mentioned offence, if the consequences had not happened or were not known to the Court to have happened at the time when he was acquitted or convicted.⁴⁴⁸
 - c. constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.⁴⁴⁹

7.11 PLEAS OF *AUTREFOIS ACQUIT*

It is a fundamental principle of law that a man may not be put twice in jeopardy for the same offence. The term *autrefois acquit* means that if a man has been tried and found to be not guilty of an offence by a Court competent to try him, the acquittal is a bar to a second charge for the same offence.⁴⁵⁰

A conditional discharge is a bar to a plea of *autrefois acquit* but an absolute discharge is not.⁴⁵¹

An absolute discharge occurs when the magistrate finds the accused guilty and considers that the case is such that he wishes to award no punishment and discharges the accused person by merely cautioning him. He may consider that no useful purpose may be served by punishing him. The fact that he has been found guilty is sufficient punishment. The magistrate has discretion to convict and caution the accused.⁴⁵² The discharge is absolute and the accused may plead *autrefois convict* to a subsequent charge on the same facts.

A conditional discharge occurs when the prosecution requests that the charge be withdrawn at any time before the accused is called upon to make his defence and the magistrate discharges him. Such a discharge will not operate as a bar to subsequent proceedings and he may not plead *autrefois acquit*.⁴⁵³

In *Republic v Nathu and another*,⁴⁵⁴ the appellants were charged with certain offences but were later on discharged. As the magistrate did not make a note of this in the case file, there was some doubt as to whether the prosecutor did

447 *Ibid*, s 135(1).

448 *Ibid*, s 140.

449 *Ibid*, s 141.

450 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13) pp 58.

451 *Ibid*, pp 58.

452 See s 35 of the Penal Code (Cap 63 Laws of Kenya).

453 See s 87(a) of the CPC.

454 [1944] 11 EACA 62.

specifically ask to withdraw in this instance. The appellants were subsequently charged with the same offences on the same facts. The Court of Appeal held that the magistrate had rightly applied the section, had discharged the accused and had not acquitted him. As such, the plea of *autrefois acquit* was not available to him.

7.12 PLEA OF *AUTREFOIS CONVICT*

The rule against double jeopardy applies with equal if not more force to convictions.

The test is not whether the facts relied upon in the two trials are the same but whether the accused has been convicted of an offence which is the same as that with which he is subsequently charged. This test was illustrated in the English case of *Republic v Thomas*⁴⁵⁵ where the accused was convicted of wounding his wife with intent to murder her and sentenced to seven years' imprisonment. Within a year and a day, the wife died of the wounding. The Court of Criminal Appeal held that although the accused had been convicted and sentenced for the wounding, he could properly be tried for the murder and could not plead *autrefois convict*. This is the very principle that underlies section 140 of the Criminal Procedure Code, under which supervening consequences or those not known at the time of the former trial are excluded from the operation of double jeopardy.

A person convicted or acquitted of an offence constituted by any acts may, notwithstanding the conviction or acquittal, be subsequently charged with and tried for another offence constituted by the same acts which he may have committed, *if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged*.⁴⁵⁶

A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person convicted, together with proof that they belong to the accused person.⁴⁵⁷

7.13 PROCEDURE IN CASE OF PREVIOUS CONVICTION⁴⁵⁸

Where an information contains a count charging an accused person with having been previously convicted for an offence, the procedure is as follows:

- (a) the part of the information stating the previous conviction shall not be read

455 [1949] 2 All E.R. 662.

456 *Supra* nt 406, s 141.

457 *Ibid*, s 142(3).

458 *Ibid*, s 277.

Pleas

out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the information, unless and until he has either pleaded guilty to or been convicted of the subsequent offence;

- (b) if he pleads guilty to or is convicted of the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the information;
- (c) if he answers that he has been so previously convicted, the judge may proceed to pass sentence on him accordingly; but if he denies that he has been so previously convicted, or refuses to or does not answer the question, the Court shall then hear evidence concerning the previous conviction:

Provided that, if upon the trial of a person for a subsequent offence that person gives evidence of his own good character, the prosecutor, in answer thereto, may give evidence of the conviction of that person for the previous offence or offences before a verdict of guilty is returned, and the Court shall inquire concerning the previous conviction or convictions at the same time that it inquire concerning the subsequent offence.

7.14 OBJECTION TO JURISDICTION

An objection as to the jurisdiction of the Court can be taken as a preliminary point and can be raised in criminal cases in much the same way as in civil cases. This was well captured in the case of *Mukisa Biscuit Co. v Westend Distributors Ltd.*⁴⁵⁹ The Court said:

... a preliminary objection constitutes a pure point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. . .

And at page 701, Sir Chirles Newbold, P said:

[A] preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.

Objections to the jurisdiction of a court embarking upon the trial of an accused person ought to be raised *in limine* at the earliest opportunity because jurisdiction is foundational to the very validity of the entire proceedings.

459 [1969] E.A. 696.

7.15 CHANGE OF PLEA

The Court has discretion at any time to allow, before sentence, an alteration of pleas. This was held in the case of *Republic v Mwangi s/o Kamuhi and another*⁴⁶⁰ The Court of Appeal in *Kioko v Republic*⁴⁶¹ stated that an accused person may apply to change plea after the prosecution has opened its case and at any time before sentencing; and that it was within the discretion of the Court, taking into account the demands of justice, to decide whether to allow or disallow the application.

In *Chacha v Republic*,⁴⁶² it was held that if after pleading guilty to a charge, discussion follows and the accused is intending for any reason to amend his plea, the charge should be read to him afresh whereupon his new plea shall be recorded.

For a long time it was held that once an accused person entered a plea of guilty, the plea could not be changed because, ostensibly, the court became *functus officio*.⁴⁶³ This, however, is no longer good law. The Court of Appeal in the case of *Kamundi v Republic*⁴⁶⁴ held that a magistrate has a judicial discretion to allow a change of plea before passing sentence or making an order finally disposing of the case.⁴⁶⁵

This power is discretionary and it is not necessarily a wrong exercise of the discretion for a magistrate to refuse to allow an accused person to change his plea from “Guilty” to “Not Guilty” just before the magistrate is about to pass sentence. It was so held in *Joseph Mugola s/o Pudha v Republic*.⁴⁶⁶

The accused person is also allowed to change his plea from not guilty to guilty of a lesser cognate offence. This is within the discretion of the Court depending on the demands of justice. The Court is, therefore, not bound to accept the offer even if the prosecution is not opposing. It ought, however, to accept the change of plea to a lesser charge where it has already accepted that of a co-accused.⁴⁶⁷

460 [1920] 2 KLR 72.

461 [1983] KLR 289.

462 [1953] 20 EACA 339.

463 See also *Okello v Republic* [1969] EA 378 and *Kibilo v Republic* [1971] EA 101.

464 [1973] EA 540.

465 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya pp 29.

466 EACA Cr App 55 of 1952 see also *Munguti v Republic* [1984] KLR 727.

467 *Kioko v Republic* [1983] KLR 289.

7.16 RETRACTION OF PLEAS

In the case of *Republic v Fulabhai Patel and another*,⁴⁶⁸ the Court said that once sentence has been passed upon an accused person who has unequivocally pleaded guilty to a charge, he cannot afterwards be allowed to retract that plea: unless he pleaded guilty to a charge which in fact disclosed no offence.⁴⁶⁹

7.17 PLEA BARGAINING⁴⁷⁰

The concept, process and procedure of plea bargaining is a most recent introduction into our Criminal Procedure Code. Indeed, it is a procedure that is yet to gain currency at the criminal bar and it is doubtful that its postulates have received judicial consideration or been otherwise tested before the Superior Courts.

In England, where the phenomenon of plea bargaining has had a much longer history, Lord Parker CJ in *R v Turner*,⁴⁷¹ set out some guidelines on plea bargaining:

1. It may sometimes be the duty of counsel to give strong advice to the accused that a plea of guilty with remorse is a mitigating factor which might enable the Court to give a lesser sentence.
2. The accused must ultimately make up his mind as to how to plead
3. There should be open access to the trial judge and counsel for both sides should attend each meeting, preferably in open Court; and
4. The judge should never indicate the sentence which he is minded to impose, nor should he ever indicate that on a plea of guilty he would impose one sentence, but that on a conviction following a plea of not guilty he would impose a severer sentence.

The judge could say what sentence he would impose on a plea of guilty but without mentioning what he would do if the accused were convicted after pleading not guilty. The only exception to this rule is where a judge says that the sentence will take a particular form, following conviction, whether there has been a plea of guilty or not guilty.

In a properly functioning system, it may be argued that plea bargaining constitutes a mutuality of benefits or advantage in that if properly managed, it guarantees that the interests of the State in ensuring offenders are punished is

468 [1946] 13 E.A.C.A 179.

469 See also the case of *Republic v F J Patel* 13 EACA 179.

470 See the CPC (Amendment) Act, Kenya Gazette Supplement 2008.

471 [1970] 54 Cr App 2352.

Essentials of Criminal Procedure in Kenya

satisfied while according the accused an opportunity to bargain for some leniency instead of each party facing the burden of time and expense culminating in an uncertain outcome.

In Kenya, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of—⁴⁷²

- (a) reduction of a charge to a lesser included offence;
- (b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

An offer for a plea agreement may be initiated by the prosecutor or an accused person or his legal representative.⁴⁷³ The parties then need to notify the Court of their intention to negotiate a plea agreement but the Court must not participate in plea negotiation.⁴⁷⁴ This is meant to preserve the court's necessary impartiality as an independent arbiter between the parties.

A plea agreement may provide for the payment by an accused person of any restitution or compensation.⁴⁷⁵ It is entered into only after an accused person has been charged, but before judgment.⁴⁷⁶

Where a prosecution is undertaken privately no plea agreement can validly be entered into without the written consent of the Attorney-General.⁴⁷⁷ This must be in deference to the Attorney-General's over-arching and residual powers of control over all criminal proceedings. It also ensures that there is no collusion between private prosecutors and suspects which may lead to future pleas of *autrefois convict* being mounted as an ambush against the Attorney General should he decide to bring the said suspect to justice.

A plea agreement on behalf of the Republic is entered into by the Attorney-General, the Director of Public Prosecutions or officers authorized by the Attorney-General as well as by any other person authorized by written law to prosecute. Any person authorized by the Attorney General to enter a plea agreement must get a written permission from him to conduct the same.⁴⁷⁸

472 Sub-s 137 A(1).

473 Sub-s 137 C(1).

474 Sub-s 137 C(2)&(3).

475 s 137 A(2).

476 *Ibid*, subs A(3).

477 *Ibid*, sub-s A(4).

478 *Ibid*, sub-s B.

Pleas

A prosecutor can only enter into a plea agreement:⁴⁷⁹

- (a) after consultation with the police officer investigating the case;
- (b) with due regard to the nature of and the circumstances relating to the offence, the personal circumstances of the accused person and the interests of the community;
- (c) unless the circumstances do not permit, after affording the victim or his legal representative the opportunity to make representations to him regarding the contents of the agreement.

A plea agreement must:⁴⁸⁰

- i. Be in writing and accepted by the accused person; or explained to him in a language he understands
- ii. if the accused person has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that the interpreter is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement
- iii. state fully:
 - 1. the terms of the agreement
 - 2. substantial facts of the matter
 - 3. all other relevant facts of the case and any admissions made by the accused person
- iv. Be signed by the accused person or his legal representative
- v. Be signed by the complainant if a compensation order has been included in the agreement

7.18 RECORDING OF PLEA AGREEMENT BY COURT⁴⁸¹

Before the Court records a plea agreement, the accused person is placed under oath and the Court addresses him personally in Court. He is informed of, and Court determines that he understands –

- (a) the right to –
 - (i) plead not guilty, or having already so pleaded, to persist in that plea;
 - (ii) be presumed innocent until proved guilty;
 - (iii) remain silent and not to testify during the proceedings;
 - (iv) not being compelled to give self-incriminating evidence;
 - (v) a full trial;
 - (vi) be represented by a legal representative of his own choice, and where

479 *Ibid*, sub-s D.

480 *Ibid*, sub-s E.

481 s 137E.

Essentials of Criminal Procedure in Kenya

- necessary, have the Court appoint a legal representative;
- (vii) examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as those applying to witnesses called by the prosecution;
- (b) that by accepting the plea agreement, he is waiving his right to a full trial;
- (c) the nature of the charge he is pleading to;
- (d) any maximum possible penalty, including imprisonment, fine, community service order, probation or conditional or unconditional discharge;
- (e) any mandatory minimum penalty;
- (f) any applicable forfeiture;
- (g) the Court's authority to order compensation,⁴⁸² restitution,⁴⁸³ or both;
- (h) that by entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence;
- (i) the prosecution's right, in the case of prosecution for perjury or false statement, to use against the accused any statement that the accused gives in the agreement.

The prosecutor must lay before the Court the factual basis of a plea agreement and the Court must determine and be satisfied that there exists a factual basis for the plea agreement.⁴⁸⁴ In other words, the court is not bound to accept any or all plea agreements negotiated by parties.

7.19 REJECTION OF PLEA AGREEMENTS⁴⁸⁵

Where the Court rejects a plea agreement —⁴⁸⁶

- (a) it must record the reasons for such rejection and inform the parties accordingly;
- (b) the plea agreement becomes null and void and no party is bound by its terms;
- (c) the proceedings giving rise to the plea agreement become inadmissible in a subsequent trial or any future trial relating to the same facts; and
- (d) a plea of not guilty is entered accordingly.

Where a plea agreement has been rejected by the Court and a plea of not guilty consequently entered, the prosecution may, upon being informed of the rejection of the plea agreement, proceed to try the matter afresh before another court. The accused person may waive the right to have the trial proceed before another court in which case the trial will proceed⁴⁸⁷ before the one that rejected the plea agreement.

⁴⁸² s 175(2)(b) of the CPC.

⁴⁸³ *Ibid*, s 177.

⁴⁸⁴ s 137 H(2).

⁴⁸⁵ *Ibid*, Sub-s J.

⁴⁸⁶ *Ibid*, J(1).

⁴⁸⁷ *Ibid*, J(2).

Pleas

Upon rejection of a plea agreement, there **MUST** be no further plea negotiation in a trial relating to the same facts.⁴⁸⁸

Where the Court has rejected a plea agreement, no party can appeal against, or apply for a review of the order.⁴⁸⁹

7.20 WITHDRAWAL OF PLEA⁴⁹⁰

An accused person may withdraw a plea of guilty pursuant to a plea agreement –

- (a) prior to acceptance of the plea by the Court, for any reason; or
- (b) after the Court accepts and convicts on the plea, but before it passes a sentence, if the accused person can demonstrate, to the satisfaction of the Court, a fair and just reason for requesting the withdrawal

7.21 FINALITY OF JUDGMENT

The sentence passed by a Court under a plea agreement is final and no appeal lies therefrom except as to the extent or legality of the sentence imposed.⁴⁹¹

The Attorney-General (Director of Public Prosecutions), in the public interest and the orderly administration of justice, or the accused person, may apply to the Court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on grounds of fraud or misrepresentation.⁴⁹²

Notwithstanding anything contained in any written law for the time being in force, the statements or facts stated by an accused person in a plea agreement must not be used for any other purpose except for the purpose of that plea bargaining.⁴⁹³ The same are considered to be privileged.

488 s 137J (3).

489 *Ibid*, Sub-s J4.

490 *Ibid*, Sub-s K.

491 *Ibid*, Sub-s L(1)

492 *Ibid*, Sub-s L(2)

493 *Ibid*, Sub-s L(3)

CHAPTER EIGHT

BAIL

8.1 DEFINITION:

Bail is the release from custody, pending a criminal trial, of an accused on the promise that money will be paid if he absconds.⁴⁹⁴

All decisions on whether to grant bail therefore involve delicate (questions of) balancing of interests. A person is presumed innocent of a criminal charge until he is proven guilty of it.⁴⁹⁵ To refuse bail to an accused person might involve depriving someone of some liberty who is subsequently not found guilty or, even if convicted, is given a non- custodial sentence. On the other hand, to allow liberty to an accused person pending trial might be to allow him to abscond, to interfere with witnesses, to tamper with the evidence, to commit more crimes or engage in other conduct prejudicial to the cause of justice.

The basic way in which the law seeks to find the right balance in such matters is by operating a general presumption in favour of bail; a presumption which can be overturned if one or more of a number of indices of suspicion exist in respect of a particular accused person. Even where bail is granted it may be subject to certain conditions to promote public safety and the interests of justice. These are discussed later on in the chapter.

8.2 THE OBJECT OF BAIL

The object of bail is to ensure that the accused person will attend his trial, without his being detained in prison on remand. It is undesirable to detain persons in prison if it is not necessary. The system of granting bail is an alternative⁴⁹⁶ born of fairness and pragmatism.

8.3 BAILABLE AND NON-BAILABLE OFFENCES?

The question of bail is often a very emotive one especially where the persons seeking or obtaining it are facing charges about which the community feels very strongly. Where a person is charged with violent and destabilizing offences, he

494 Gary S and Cavendish D K (2003), *The English Legal System* (Sixth Edition) pp 445-450.

495 See the case of *Wainaina v Republic* [1990] KLR 332.

496 Douglas B (1964) *Criminal Procedure in Uganda Kenya* (Law in Africa) (No 13) pp 57.

Essentials of Criminal Procedure in Kenya

becomes the subject of great social revulsion or even violence and public opinion is overwhelmingly weighted against his being allowed to walk and mingle freely among the good and the innocent. This pro-public safety stance found reflection in the law.

Section 72(5) of the repealed Constitution provided that a person arrested and brought to Court charged with a criminal offence and not tried within reasonable time shall, *“unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial. . .”*

On its part, the Criminal Procedure Code section 123(1), which is yet to be amended, reflects the same capital offences exception to bail in the following terms:

When a person, other than a person convicted of murder, treason, robbery with violence or attempted robbery with violence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.

In the case of *Margaret Magiri Ngui v Republic*,⁴⁹⁷ the applicant was charged, *inter alia*, with robbery with violence—a capital offence. She applied for bail in the High Court and she was refused. She thereafter applied to the High Court as a constitutional Court for the reading of section 123 of the Criminal Procedure Code which conflicted with the Constitution as to the provisions of bail. Whereas section 72(5) of the Constitution, as it then stood, allowed bail generally to persons charged with any offence, section 123 of the Criminal Procedure Code denied bail for capital offences.

The Court considered this application on merit having found that it had power to grant or refuse bail. It held that bail, as a general rule, should not be granted where the offences charged carry a mandatory death penalty because the temptation to abscond in such cases is very high. It was noted that this was the practise in England in cases of murder. The Court refused to release the applicant on bail. Soon after, the Constitution was amended to deprive courts of power to release persons charged with offences carrying the death penalty on bail.⁴⁹⁸

⁴⁹⁷ Douglas B (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No 13) pp 57.

⁴⁹⁸ Act No. 20 of 1987.

Bail

Thus the recently repealed Constitution⁴⁹⁹ read together with the current Criminal Procedure Code⁵⁰⁰ had provisions denying bail for offences such as:

1. Murder
2. Treason
3. Robbery with violence
4. Attempted robbery with violence

In the new Constitution, however, the legal position on bail has reverted to the pre-*Ngui* state. Article 49(1) (h) of the Constitution states that a person who has been arrested has the right to be released on bond or bail pending charge or trial. The terms of the bond or bail are to be reasonable without classification or distinction between bailable and non-bailable offences. Inevitably, this provision became the first to attract much contestation in the courts as, persons charged with capital offences suddenly sought admittance to bail

In the first known such case, *Republic v Taiko Kitende Muinya*,⁵⁰¹ the accused, who was charged with murder, applied to be admitted to bail. The High Court stated that under the Constitution and as of 27 August 2010, there was no longer a category of offences characterized as non-bailable, but went on to say that the right of an accused person to be released on bail, although a constitutional right, was not absolute and:

...the court may decline to release him in appropriate cases and the appropriateness or otherwise is no longer pre-determined by statute, as was the case before the promulgation of the new constitution, when all persons charged with offences attracting death sentences could not be granted bail or bond pending trial.

In this case, the accused had absconded from home for about two months. He had been charged with the offence of murder, which is a serious offence and that still attracts the death sentence upon conviction. In these circumstances, there were compelling reasons to warrant the accused being deprived of his liberty pending trial, although there might arise developments which could result in a change on the position then taken by the court.

This decision spawned immediate controversy and much debate not least found in The Nairobi Law Monthly Magazine,⁵⁰² where a writer expressed his opinion over the matter in rather robust terms:

499 s 72(5).

500 s 123(1).

501 High Court Criminal Case No 65 of 2010 (Unreported)

502 Vol 1 Issue No 1/ October 2010 p 95 "One Step Forward Two Leaps Backwards: A Review of Criminal Case No 65 of 2010 *Republic v Taiko Kitende Muinya*" p 94.

Essentials of Criminal Procedure in Kenya

The Judge misapprehended and misapplied the letter and spirit of the law resulting to gross injustice to the accused. The right to bail is absolute under the new constitutional order. The reasons advanced by the judge for denying bail are not persuasive. It is a clear testimony of how the thinking of our judges is trapped by the old order syndrome.

He further contended that the judge was wrong to deny bail to the accused in the absence of any compelling reasons:

Of what value was it for the court to hold that the suspect was free to make the same application as the trial developed? This is despicable. The judge simply ignored the Constitution's plain language and original meaning. Yet the Constitution does not give judges any authority to evolve or transcend its language. ... The judges are bound by the new law and indeed in the face of such express provisions of the law there is no room for discretion. Accordingly, the decision was wrong and it serves no other purpose but to discredit a judiciary that is labouring under the twin burdens of corruption and incompetence.

Such a categorization of the ruling in *Taiko Muinya* is hardly correct or justified. On proper analysis and on its own textual command, the Constitution does not grant an unqualified right to bail. It permits judges to exercise denial discretion where compelling reasons are extant. It is noteworthy that the judge did set out no less than four reasons which he considered sufficiently compelling⁵⁰³ namely seriousness of the offence and the gravity of the sentence (which may incline the accused to abscond), the relationship between the accused and potential witnesses (his influence over whom might cause him to interfere with them) and his antecedents or prior conduct (in this case his previous two-month flight).

The same judge denied bail to murder suspects who had been in custody for three years in the case of *Joseph Wambua Mutunga and 3 others v Republic*.⁵⁰⁴ In their application for bail, the accused persons stated that there were no compelling

503 The judge analogized 'compelling reasons' with 'interests of justice' as used elsewhere and made reference to the decision of the Supreme Court of Appeal of Malawi in *Fadweck Mwahe v the Republic* SC 20A/2006 which held that:

... in considering the issue of the interests of justice the paramount issues the court will consider include the likelihood of the accused attending his trial, the risk that if he is released on bail the accused person may interfere with the prosecution witness or tamper with evidence, the likelihood of his committing another offence or other offences and also the risk to the accused person, if granted bail and returns to his village where the deceased's relations may harm him. In considering these issues the court may take into account, among other things, such factors as the gravity of the offence, the punishment likely to be imposed and indeed that the accused is a sickly person.

504 High Court Criminal Case No 23 of 2008 (Unreported).

Bail

reasons to warrant their continued stay in custody pending trial. The court noted that accused persons are not automatically entitled to be released on bond or bail and acknowledged that there were challenges in the implementation of the law as provided for by the Constitution. In essence therefore, the right to be released on bond or bail is not automatic except if the offence with which an accused person is charged is punishable only by a fine or by imprisonment for no more than six (6) months.

*Republic v Danson Mgunya and another*⁵⁰⁵ is probably the first case where bail was granted to suspects facing a capital trial. The appellants were charged with the offence of murder. Exercising their right under the new Constitution, they applied for bail. They were elderly members of the society, married and with children. They had fixed abodes and their places of residence were known. The first accused was an administration officer and the second accused was a chief- both were public servants working for the government. The State opposed the application for bail contending inter alia that due to the severity of the sentence there was a high possibility of flight or absconding. Moreover, the case had proceeded expeditiously and was about to be concluded, the evidence adduced was hard and incriminating. The State contended that there should be no discrimination on the ground that the Applicants were public servants and that there must be equality in the eyes of the law. In making its ruling on whether or not the accused persons were entitled to bail, the Court found that there were no compelling reasons to continue with the detention of the accused and it did not matter that the trial was almost coming to an end with three witnesses remaining. The Applicants were then released on a bond of Ksh 3 000 000 each with two sureties each for like amount.

The judge in the above case (Mohammed Ibrahim J) fully appreciated that each case is to be determined on its own facts and circumstances and further that the right to bail is not absolute. Indeed, in the case of *Republic v John Kahindi Karisa and 2 others*,⁵⁰⁶ the same judge declined an application for bail made by a murder suspects stating that:

...murder touches on the social fabric and it affects the security of and peace in the community. As a result, there is great desire by a court to be assured that all things being equal the accused shall not likely but indeed, attend court on the day of trial freely, voluntarily and without any coercive compulsion. I am of the view that in

505 Mombasa HiC Criminal Case No 26 of 2008 (Unreported).

506 Mombasa HC Criminal Case No 23 of 2010 (Unreported).

Essentials of Criminal Procedure in Kenya

this case there is real risk that if released upon bail the applicants will be tempted to abscond. In other words the risk of or probability of flight are high if not real in this case. Such bona fide apprehension by the court is a compelling reason not to release the applicants; I am therefore constrained to refuse bail in this case.

The judge had given the reasons for his discomfort about granting bail in the following terms:

Balancing and considering all the facts and circumstances of this case and bearing in mind the Applicants' constitutional right to bail and their respective presumption of innocence, I am still not convinced that the two accused here have given the court sufficient comfort and assurance that they will be available and attend court from time to time and for the trial.

I think that an accused person should make some effort and show or give the court some reasons to dispel the apprehension that he would abscond. The present accused persons have not told court the following:

- a) What they do for a living i.e. occupation
- b) Marital status
- c) Whether they have children
- d) Whether they are Kenyan citizens or not
- e) Any references from their Church, Mosque, Temple of Synagogue
- f) Any leadership or other position in society which makes them dependable

Of course the court would release on bail on conditions or terms including sureties. However, in a serious case of murder, monetary or property security should not be the only consideration.

It may then be safe to state that the grant of bail in capital cases, given all the factors and considerations to be borne in mind when considering bail applications as discussed above and hereunder is a rare exception and is unlikely to become a common feature of our criminal justice system.

Moreover, accused persons arrested and arraigned in court are under suspicion, often strong and well founded, and no matter the charge facing them, be it capital or non-capital, to have trampled on the rights of other persons, which provides justification for the temporary curtailment of their right to liberty.

That bail is not a facility to be granted on demand but rather one subject to the discretionary power of the Court to grant or refuse it is well expressed in the case of *Musyoki v Republic*,⁵⁰⁷ where Justice Fred A. Ochieng stated that if the law

507 [2004] eKLR(Criminal Case No. 1330 of 2003).

Bail

was as straight forward as expressed by section 72(5) of the Constitution (or Article 49(1)(h) of the new Constitution for that matter) every accused person not facing a capital offence (an exception that now does not apply), and who had not been tried within a reasonable time, would not be asking the Court for bail pending trial. They would instead demand that the Court solely determine whether or not bail would be unconditional or conditional; and if conditional to impose the appropriate terms and conditions. Therefore, where the Court forms the considered view that an accused person is more likely than not to abscond if granted bail, then it would be wrong for it to nonetheless release the person on bail.

Bail may be granted to an accused person conditionally or unconditionally and it may be applied for at any time during the proceedings. Moreover, the application may be made many times. Bail is intended to allow the accused to lead their normal lives outside while waiting for the trial of their case.⁵⁰⁸

The High Court has power, on application to it, to grant bail where the subordinate court has refused to grant it. Moreover, it may reduce the amount required or imposed by such court or police officer.⁵⁰⁹

Such bail is fixed with due regard to the circumstances of each case and should not be excessive or it would defeat the purpose of the bail itself.⁵¹⁰ In the case of *Patrick Irungu Maina v Republic*,⁵¹¹ the accused had been admitted by a magistrate's court to a bail of Ksh.150 000 for the offence of obtaining money by false pretence, which attracted a maximum penalty of three years imprisonment. The High Court found that the imposed Ksh. 150 000 was excessive considering that the total amount alleged to have been obtained by the applicant was Ksh. 98 000.

In the case of *Republic v Jamal Din*,⁵¹² it was held that withholding bail by the Court is wrong. When an accused person appears in Court for his hearing, he is entitled to have his bail money returned to him.

8.4 THE NATURE OF BAIL⁵¹³

Historically, the main reason for refusing to grant bail was that the accused would abscond.⁵¹⁴ The first general semi-official review on the principles on which bail should be taken was by the Lord Chancellor, Lord Hailsham, and the sentiments he

508 Gary S & Cavendish D. K. (2003) *The English Legal System* (Sixth Edition) pp 445–450.

509 *Supra* nt 455 S 123(3)

510 s 123(2) of the CPC.

511 [2006] eKLR (Miscellaneous Application No. 27 of 2006) .

512 12 EACA 75

513 Zander M. (1992), *Cases and Materials on the English Legal System* [Sixth Edition] pp 250– 254.

514 *Re Robinson* [1854] 23 LJ KB 286.

expressed remain valid. Speaking to magistrates at a private meeting he stated:

- I. The refusal for bail is not a punishment and must never be used as such. This is particularly important to remember when granting or refusing bail prior to verdict or finding of guilt.
- II. Prior to conviction, prima facie an accused person is entitled to bail, especially before trial, unless there is some reason to believe that he might run away, get at the witness or commit further offences.
- III. In granting or refusing bail, you are bound to come to a decision on probabilities and uncertainties . . . To deprive a man liberty pending trial or even pending sentence is to deprive a certain number of persons of liberty who are going to be acquitted, or upon whom no custodial sentence is going to be passed in the event, and to do so is to deprive them of something to which they are entitled to as in the sight of God.

Human justice is fallible: people do occasionally actually jump their bail, and more often they do get at the prosecution's witnesses and so prevent a fair trial of their case. The difficulty is to identify these cases in advance and to decide on what criteria to decide them and on what degree of certainty to act. Absolute certainty is impossible. Mere suspicion is evidently not enough and though attention is to be paid to police objections, there is no rule to follow them blindly.⁵¹⁵

8.5 CLASSIFICATION OF BAIL

Bail may be classified into three:

1. Bail pending Trial
2. Bail pending appeal
3. Anticipatory Bail

i. Bail pending Trial

Bail pending trial may be granted:

- a) By the police at the police station
- b) By a magistrate in Court

a) Bail from the Police Station

Other than the Constitution that provides that reasonable bond or bail is a substantive right of an accused person, section 123 of the Criminal Procedure Code states that a person who is arrested and is at the police station for a non-capital offence (an obsolete, and in effect repealed and inapplicable,⁵¹⁶ distinction); and is

⁵¹⁵ *Ibid.*

⁵¹⁶ Per Judge M K Ibrahim in *Republic v John Kahindi Karisa and others* (*infra*)

Bail

ready to give bail, may be admitted to bail.

The Officer in Charge of the Station exercises this power where it is impracticable to produce the alleged person (being arrested) before court within reasonable time. The release may be upon the person arrested executing a bond of a reasonable amount, with or without sureties, to appear at a specific time and specific court. If a person arrested is not released on bail, he must be brought to court without delay.⁵¹⁷ The Officer in Charge of the Station may release the person arrested where he deems that no offence has been committed. There is a check on this power wherein the Officer in Charge of the Station is required to make *apprehension reports* to the magistrate. Officers in charge of police stations must report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations, whether those persons have been admitted to bail or not.⁵¹⁸

In *Hussen v Republic*,⁵¹⁹ the Court said that the officer in charge of a Police Station is required to inquire into the case before he exercises his discretion to release the person on bail. He may release the accused if in his opinion there is insufficient evidence to proceed with the charge.

If a person is arrested on a warrant, the warrant will state whether he is to be held in custody or released on bail.⁵²⁰ But if he is arrested without a warrant, the police will have to decide whether or not to release the suspect after they have charged him. In terms of best practices, a suspect should only be detained in the police station if the custody officer reasonably thinks that such a detention is “necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him.”⁵²¹

b) Bail decisions by Court

The presumption in favour of bail works solely to the grant of bail by a Court post-charge and prior to conviction at all stages of the proceedings.⁵²² It can be accorded at any time during the proceedings. The presumption continues to apply post-conviction where a Court adjourns the case in preparation of post-sentencing reports.⁵²³

517 s 36 of the CPC.

518 s 37 of the CPC.

519 [1990] KLR 425.

520 *Supra* nt 442, s 103(1).

521 Zander M (1992), Cases and Materials on the English Legal System [Sixth Edition] pp 250- 254.

522 *Supra* nt 444, s 123.

523 *Ibid*, s 357.

Essentials of Criminal Procedure in Kenya

Under the English law, where the prosecution seeks to rebut the presumption by objecting to the accused person being granted bail, the Court will invite both the prosecution and the defence to make submissions on the matter. The magistrate, after hearing the prosecution's objection and any counter objections, will then give his decision.⁵²⁴ The procedure is largely the same under our law.

Moreover, when a Court adjourns a case- whether overnight or for a week or a month- it has to decide whether the accused person should be released on bail or remanded in custody. The High Court may, whether or not a person has been committed for trial, direct that the person be admitted to bail with or without sureties. It may also reduce the bail directed by a subordinate Court or police officer.⁵²⁵

In *George Kamau Ng'ang'a v Republic*,⁵²⁶ Chesoni J., laid down the principles that a court should consider when granting bail:

- a) That in view of the presumption of innocence, bail should generally be granted unless the prosecution shows substantial reasons that:
 - i. The accused will fail to turn up for trial or surrender to custody
 - ii. The accused will obstruct the cause of justice
 - iii. The accused will commit similar offences
- b) The primary consideration is whether the accused is likely to enter into trial⁵²⁷. So the Court should consider:
 - i. The nature of the offence
 - ii. The severity of punishment
 - iii. The strength of the prosecution's case
 - iv. Antecedent character of the accused
 - v. Likelihood of interfering with witnesses
- c) Each accused person's application must be considered on its own:
 - i. Facts
 - ii. Circumstances⁵²⁸
 - iii. Merits
- d) The granting of bail to one accused and denial of the co-accused of bail is not discriminatory within the meaning of section 82 of the Constitution.⁵²⁹

The Court stated:

Even without the Constitutional provisions, generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt

524 *Supra* nt 445.

525 *Supra* nt. 470.

526 High Court Miscellaneous Criminal Application No 61 of 1981.

527 *Muite v Republic* [1991] KLR 579.

528 See *Wainaina v Republic* [1990] KLR 332.

529 See Article 27 of the Constitution

Bail

is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that he will abscond.

In the case, it had been argued that the release of the co-accused on bail leaving the applicant was discriminatory and could not be justified in law. The court rejected this contention, holding, in our view correctly, that a case may have two or more accused persons yet the court may rightly grant bail to some and refuse bail in respect of the others, without being in breach of any constitutional provisions. This must be so considering that the propensity to abscond is to be determined by his individual circumstances and being charged with the same offence as others does not equalize those circumstances.

Courts have traditionally been slow to dismiss any objections to bail that the prosecution may raise. This is out of a necessary caution for it would be greatly embarrassing were the court to lightly dismiss such objections and then the thing feared, namely, the accused person's flight, actually materialises. Thus in the case of *Muraguri v Republic*,⁵³⁰ the Court held that the seriousness of the offence in all the circumstances was such that there was a very real risk that if released upon bail the applicant would be sorely tempted to abscond. In deciding whether the accused is to be granted bail, the Court will carefully consider the grounds for objecting to bail raised by the prosecution and challenged by the defence.

It is safe to say that since bail is an important right, courts now require the prosecution to discharge a greater burden before agreeing to curtail the right. In the case of *Republic v Danson Mgunya and another*⁵³¹ the Court held that if the prosecutor objects to the release of the accused person from detention pending trial, then at the first instance, the burden should be on the prosecution and not the accused person to prove or at least demonstrate the existence of compelling reasons which must be stated, described and explained.

8.6 FACTORS TO BE CONSIDERED BEFORE BAIL IS GRANTED

There are various factors⁵³² which must be considered before bail is granted.

In *Opinder Singh Naul v Republic*⁵³³ it was stated that:

... the correct test whether bail should be granted or refused is whether it is possible

530 [1989] KLR 181.

531 *Supra*

532 Law and the Administration of Justice in Kenya (1992), International Commission of Jurists General Printers Limited, Edited By Kivutha Kibwana.

533 Misc Cr. Application No. 178 of 1981.

Essentials of Criminal Procedure in Kenya

that the accused person will appear in Court to take his trial.⁵³⁴ The test should be applied by reference to several considerations: the nature of the charge, severity of the punishment and the evidence in support of the charge.

And in the Nigerian case of *Alhaji Mujahid Dukubo Asari v Fedeasl Republic of Nigeria*,⁵³⁵ which was cited by Ibrahim J in *Republic v John Kahindi Karisa and another*,⁵³⁶ the trial court stated:

... When it comes to the issue of whether to grant or refuse bail pending trial of an accused person by the trial court, the law has set out some criteria which the trial court shall consider ...

- i. the nature of the charges;
- ii. strength of the evidence which supports the charge;
- iii. the gravity of the punishment in the event of conviction
- iv. previous criminal record of the accused, if any
- v. the probability that the accused may not surrender himself for trial
- vi. the likelihood of the accused interfering with the witnesses or may suppress any evidence that may incriminate them
- vii. the likelihood of further charges being brought against the accused
- viii. the probability of guilt
- ix. detention for the protection of the accused
- x. the necessity to procure medical or social report pending final disposal of the case

It went further to state that:

The main function of bail is to ensure the presence of the accused during trial ... accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, *it is the mother of all the criteria enumerated above* (emphasis added).

In the case of *Republic v Danson Mgunya and another* (above) the court observed that the considerations were neither universal nor exhaustive. The Court adopted the Nigerian case with reservations. In particular, the judge opined that the strength of the evidence which supports the charge ought not to apply in Kenya (except where perhaps the application for bail is being made or renewed after the court has placed the accused in his own defence) as it was inconsistent with the principle that an accused person is presumed to be innocent and should be applied with great caution and only in exceptional circumstances like where there are

⁵³⁴ See *Watoro v Republic* [1991] KLR 281.

⁵³⁵ SC 20A/2006 Reported also in *Republic v Mgunya and another*

⁵³⁶ HC Criminal Case No 23 of 2010

Bail

statements that show that the accused was caught in the act or where there is a lawfully admitted confession.

The grounds or factors that a court will consider when determining the question of pre-trial bail can be summarised as follows:

1. *Likelihood of appearance at the trial*

This is the mother factor because if the accused is not able to attend and take his trial, bail will subvert the administration of justice. In the case of *Republic v Selwyn and 5 others*,⁵³⁷ the Court said that the test to govern the discretion of the Court in deciding whether to grant or refuse bail is the probability of the accused appearing to stand his trial. In applying the test, the Court will not look to the character or behaviour of the accused at any particular time, but will be guided by the nature of the crime, severity of the punishment imposed therefor and the probability of a conviction.

In determining whether the accused will turn up his *status* and social connection must be considered. If he is a non-resident and he faces a serious charge, there is the chance that he will be tempted to flee. It is necessary, sometimes, for the Court to order that the accused produce sureties before the application for bail is granted. This is useful because it enables the Court to determine whether the sureties are people being bought by a non-resident who will leave them money to pay up should they be ordered to forfeit the recognizance after the accused absconds.

2. *Likelihood of interference with investigations*

This is especially so where the investigations may be incomplete by the time the accused is presented in court and particularly necessitated by the complex nature of some cases. It may not be entirely just to release an accused at a stage where there is a high likelihood of his interfering with the investigations including by concealment, destruction or tampering with the evidence.

3. *Likelihood of interfering with witnesses*

The court would deny bail to an accused person who is in a position to interfere with witnesses whether by violence, which may even take the extreme form of elimination, or threats and intimidation or even bribery and other forms of negative

537 [1952] KLR 16. see also *Republic v Joseph Wambua Mutunga and others* Criminal Case No 23 of 2008

influence so that the witnesses either do not turn up or do not testify or alter their testimony at his behest. In the *Mgunya case* (above), the court stated that the relationship, if any, between the accused person and the potential witnesses is a prime factor to consider before bail is awarded. If the accused person was a person who was either related to the witness or a person who stood in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact he might have on the witnesses, if he was released pending trial.

4. *The nature of the offence the accused is charged with*

Although the constitution does not cite the seriousness of the offence with which an accused is charged as a factor, it is undoubtedly a relevant factor.⁵³⁸ The more serious the charge, the more likely it is that the accused will abscond and not attend the trial and the more likely it is, therefore, that he will be denied bail.

In *Watoro v Republic*,⁵³⁹ the Court held that the seriousness of the offence has a clear bearing, which the Court ought to bear in mind, on the factors influencing the mind of an accused facing a charge in respect of an offence as to whether it would be a good thing to skip the trial or not. Porter J, went on to say that such a possibility was not out of question as it had happened before in similar cases. In the *Mgunya Case* (above), the court said that this was so because accused persons may be more inclined to abscond if the charge against them was serious and if the sentence was heavy.

To determine how serious the offence is, the Courts look at the sentence provided at the end of the rope- the sentence that is likely to be meted out to the accused in the event of conviction.⁵⁴⁰ In the *Mutunga Case*,⁵⁴¹ the court stated that were it to grant bond or bail to an accused person, it would ensure that the conditions thereof were reasonable and in order to be considered reasonable, the conditions would be influenced by, amongst other factors, the nature of the offence and the severity of the sentence that the offence attracts. And in the *John Kahindi Karisa Case*⁵⁴² the judge, in appreciating the seriousness of a murder case and the weight to be attached to it in considering bail stated as follows:

Murder is a serious offence and attracts the death penalty. Self preservation is a natural reaction or response of any human being. Whatever the court will decide, the fear and anxiety exerting on an accused's mind during the trial in a murder case cannot

538 *Supra* nt 536.

539 [1991] KLR 281.

540 *Republic v Taiko Kitende Muinya (Supra)*.

541 *Infra*.

542 *Supra*

Bail

be ignored. The possibility of thinking of flight by an accused person facing capital offence is real and cannot be wished away.

5. *Likelihood of commission of more offences*

It normally is difficult to tell whether the accused is likely to commit any other offence because, in any case at this stage, the Court is not entitled to know the accused person's previous record. But where a person is on bail and is charged with another similar offence alleged to have been committed when on bail, the Court may be entitled to refuse bail.

In *Mohamed Khamis Mazrui and others v Republic*,⁵⁴³ the Court stated:

“It must be borne in mind that the fundamental rights of liberty are subject to respect for the rights and freedoms of others and for public interest. Public interest cannot be considered in isolation from public peace, tranquillity and security. Public interest does include these and much more. It includes maintenance of law and order without which the rule of law, which is the fountain-head of the Constitution of any country, would not subsist or sustain.”

6. *Safety or security of the accused*

The accused person should also not be granted bail if the Court is satisfied that he should be kept in custody for his own protection.⁵⁴⁴ An accused person is likely to be remanded in custody for his own protection where he poses a danger to himself or is charged with an offence that excites considerable public revulsion such as child/ sexual abuse or paedophilia. It may also be in the best interest of a suspect to be denied bail and kept in safe and protective custody if he is a child or a young person without a family.

7. *The accused is serving a custodial sentence*

Clearly an accused person who is already serving a custodial sentence for another offence cannot expect to be granted bail in connection with new matters and should not expect success on a bail application in such circumstances. The Court should, however, ascertain the earliest date of release to ensure the accused is not remanded in custody later than that date. Once the prior custodial sentence is served, there is no bar to the making of an application for bail in the current case.

⁵⁴³ High Court Criminal Application No 81 of 1985.

⁵⁴⁴ See s 72(1)(f)(g)(h) of the repealed Constitution.

8. Breach of bail terms

Where, having been previously released on bail in connection with the same offence, an accused person absconds or otherwise breaches or violates the terms and conditions upon which the bail has been granted, he would not be eligible for bail.

9. Relative strength of prosecution case

If the trial court starts and it is of the opinion that the prosecution case is not very promising, the court may grant bail but this is entirely at the discretion of the court; just as it is also true that at any stage in the course of the trial if the court be of the opinion that in view of the evidence the accused may be tempted to abscond, the court may cancel bail. This may sometimes result to the accusations of bias and as a result this is a course rarely resorted to.

10. Paucity of Information

The accused may not be granted bail where the Court is satisfied that it had not been practicable to obtain sufficient information to enable it to make a decision in relation to bail.⁵⁴⁵ There may be instances where the police have charged a suspect but still have insufficient details as to his identity and address. In these circumstances a Court is entitled to refuse bail until such time as the information is available.

11. The circumstances out of which the charge had arisen

The court is entitled to look at the totality of the circumstances out of which the charges facing the accused arose. Thus in *Wainaina v Republic*,⁵⁴⁶ the accused was charged with various offences apparently arising out of circumstances surrounding the death of a Minister in the Kenyan Government in that he allegedly attempted to take advantage of that death to make personal pecuniary gains for himself. He even attempted to bribe a police officer. In refusing an application for bail, the resident magistrate took into consideration circumstances out of which the charge had arisen. The applicant appealed against the refusal. On appeal, Omolo J. sitting in the High Court held that magistrates are entitled to take into account the circumstances out of which the charges arose and weigh them in deciding whether or not the applicant should be granted bail.

⁵⁴⁵ *Republic v John Kahindi Karisa and others (Supra)*

⁵⁴⁶ [1990] KLR 332.

12. *Deposit in lieu of recognizance:*

The Court may require a person to execute a bond or deposit money or some property as a condition for his release.⁵⁴⁷ When such a person executes a bond, he essentially promises the court that he will appear in court when required. He may, however, be required, in addition to or instead of executing the bond, to deposit a sum of money fixed or determined by the court or to deposit property. When money is deposited by the accused person or by some other person on his behalf under these circumstances, it is referred to as *cash bail*.

The court has power to issue a warrant of arrest directing that a person released on bail be brought before it, and may order that such person find sufficient sureties if the bail imposed in the first instance is found to have been insufficient due to mistake, fraud or some other reason. Where he fails so to do, the person may be committed to prison.⁵⁴⁸

8.7 SURETIES AND DISCHARGE OF SURETIES

The Court may require that the accused person provide a suitable surety or sureties before granting him bail.⁵⁴⁹

A *surety* is a person who promises to forfeit a sum of money fixed by the Court and known as a *recognizance* if the accused person fails to attend Court as and when required as directed.

The amount of recognizance is determined by the Court and is entirely at its discretion subject to the requirement that it should not be excessive. If the accused fails to answer his bail, that is to say, absconds or fails to attend court, then the surety is liable to forfeit all or part of his recognizance.

The Court conducts an examination of the sureties before admitting them as sufficient sureties to secure the release of a person in custody. A surety must be a suitable surety. Such persons would be needed to appear before Court and give evidence on oath, confirming among other things, their financial resources, their character, including any previous convictions and their relationship and proximity to the accused.

547 s 126 of the CPC.

548 *Ibid*, s 127.

549 *Ibid*, s 124.

Before the court finds that a proposed surety is suitable, it has to be satisfied that the surety understands his obligation to ensure that the accused attends court and that in default of such attendance, the surety may be liable to forfeit the property he deposits as security. In practical terms, all that a surety needs to do is come to court with documents of title to the property being offered as security. The same should be in the name of the surety and accompanied by a recent search at the relevant registry confirming the surety as the registered proprietor. He should also have a valuation report from a reputable valuator confirming that the property has a value sufficient to cover the security.

8.8 DISCHARGE OF SURETIES

A failure to abide by any condition of bail can lead to an accused person's arrest and reappearance before the Court that granted him bail. A power of arrest is available where a police officer has reasonable grounds for believing that an accused person has broken or is about to break a condition of bail. Although the accused person does not commit a further offence by breaking a condition of his bail, the Court may decide that the accused person has had his chance and shall therefore be remanded in custody for the duration of the proceedings.⁵⁵⁰

A person may apply to the magistrate to discharge a surety or a surety may apply to be discharged from his duty due to suspicion of the accused person wanting to abscond or due to misunderstanding between the accused person and himself.⁵⁵¹ Indeed, a surety is free at any time to apply to be discharged for any reason or none at all, including for personal reasons, for instance, where he may wish to free the property deposited as security for his other purposes.

Where a surety dies while he is still a surety before the bond is forfeited, the accused person must find another surety⁵⁵² and may be kept in custody until he does so. Where such death occurs, the estate of the surety shall be discharged from all liability consequent to the bond.

Where there is reasonable suspicion that the accused person is about to abscond by leaving Kenya, the person holding the suspicion is required to swear an affidavit after which a warrant of arrest is issued against the accused person. The accused person is committed to prison until trial unless the court sees it fit to admit him to bail upon further recognizance.⁵⁵³

550 s 130 of the CPC.

551 *Ibid*, s 128.

552 *Ibid*, s 129.

553 *Ibid*, s 130.

8.9 FORFEITURE OF RECOGNIZANCE

Where it is proved that an accused person has absconded, the court will issue a notice to any person bound by the recognizance to pay his penalty or to show cause why he should not pay.⁵⁵⁴

If sufficient cause is not shown and the penalty is not paid, the court may issue a warrant of attachment of sale of the moveable property belonging to the surety, or his estate if he is dead.⁵⁵⁵

If the penalty cannot be recovered by attachment of sale, the court will order the imprisonment of such surety for a term not exceeding six months.⁵⁵⁶ The court may, at its discretion, remit a portion of the penalty mentioned and enforce payment in part only of the amount of recognizance for which one had stood surety.⁵⁵⁷

Where an accused person commits an offence which constitutes a violation or breach of the conditions of his recognizance, and the same is liable to be forfeited, a certified copy of the judgment of the court that convicted him is admissible in evidence in proceedings against his sureties in the matter of forfeiture.⁵⁵⁸

All orders made by a magistrate respecting the forfeiture of recognizance are amenable to appeal to the High Court, which may also exercise its revision jurisdiction over the same as of right.⁵⁵⁹

8.10 BAIL PENDING APPEAL

Unlike pre-trial bail which has been the subject of the foregoing discussion, and which is grounded on the constitutional presumption of innocence in favour of the accused person, bail-pending appeal does not exist as of right and is issued only in exceptional circumstances.

The principles governing bail pending appeal are different from those governing bail pending trial. In the application for bail pending trial, the

554 s 131(1) of the CPC See also *Benjamin Muniyo Nzioka v Republic* [2004] eKLR (Criminal Appeal 74 of 2004).

555 *Supra* nt 495, s 131(2).

556 *Ibid*, s 131(4).

557 *Ibid*, s 131(5).

558 *Ibid*, s 131(6).

559 *Ibid*, s 132.

presumption of innocence casts the burden on the prosecution to show why the accused person should not be granted bail. In an application for bail pending appeal, the presumption of innocence is no longer operative. The Courts have held that the presumption at that stage is that the accused was properly convicted and the burden is on him to show why he should get bail pending appeal.⁵⁶⁰ Moreover, an application for bail pending appeal can only be made in respect of an offence which was originally bailable.⁵⁶¹

The High Court or the subordinate Court that convicted or sentenced a person may grant bail or may stay execution of a sentence or order pending the entering of an appeal on such terms of surety as may seem reasonable to the High Court or the subordinate Court.⁵⁶² Where an application for bail pending appeal is made in the Court which convicted or sentenced the accused, the Court should not feel inhibited to consider the application merely because it has convicted the accused.⁵⁶³ It should consider the application for bail pending appeal on its own merits and rule on the same without being unduly trammelled by the fact of conviction.

The main consideration for bail pending an appeal is that the applicant must show overwhelming chances of the appeal succeeding. If that be so, there will be no justification for depriving the applicant his freedom. The principle has been expressed thus:⁵⁶⁴

It must be remembered that a person has been convicted by a properly constituted Court, and is undergoing punishment because of that conviction which stands until it is set aside. It is not wise to intervene either from the point of view of the welfare of the appellant or the state, unless there is a real reason why the Court should hold that he should not be deprived of his liberty. The best test for that consideration is whether the appellant can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course.

In *Abdi v Republic*,⁵⁶⁵ the court held that an application for bail pending appeal is to be granted in rare and exceptional circumstances. To admit an applicant to bail is a discretion of the court which must be judiciously exercised keeping in sight all the facts relating to the application, all the matters material to the trial at the

⁵⁶⁰ *Daniel Dominic Karanja v Republic* [1986] KLR 612. Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya pp 92.

⁵⁶¹ *Ibid.*

⁵⁶² s 356(1) of the CPC.

⁵⁶³ *Supra* nt 474.

⁵⁶⁴ Kivutha Kibwana (1992) *Law and the Administration of Justice in Kenya*, International Commission of Jurists General Printers Limited, Kenya

⁵⁶⁵ [1991] KLR 171.

Bail

lower court, the grounds submitted in the petition and the chances of success. The time it would take for the appeal to be prosecuted and determined is by itself not a sufficient ground. However, such time which may, in effect, mean that a person may well have served his entire term before the appeal is heard, is a major consideration when coupled with a meritorious appeal with overwhelming chances of success since to deny bail would be tantamount to rendering the potentially successful appeal merely nugatory or illusory.

Where the accused has been sentenced to a term of imprisonment, for bail pending an appeal to be granted, there must be an overwhelming possibility of success of the appeal, so that there is no justification for the deprivation of the applicant's liberty.⁵⁶⁶

Other secondary considerations include the medical condition of the applicant, the nature of the offence, the sentence imposed and the likely delay in the preparation of the appeal record and the hearing of the same.⁵⁶⁷

The proper principle to be applied in deciding whether bail should be granted pending appeal is that the Court should not grant bail in such cases unless there are exceptional and unusual reasons appearing in the case *Republic v Waxman*.⁵⁶⁸ In this case, the long vacation between application for appeal and the date of the appeal; combined with the complexity of the case were considered good reasons to grant bail.

After the entering of an appeal by a person entitled to appeal, the High Court or the subordinate Court which convicted or sentenced that person, may order that he be released on bail with or without sureties. If that person is not released on bail, the Court may, on his request, order that the execution of the sentence or order appealed against be suspended pending the hearing of the appeal.

Where an application for bail is made to the subordinate court and refused, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate Court may appeal against the refusal to the High Court. Such appeal must be listened to by the Court as would any other matter on appeal.⁵⁶⁹ Similarly, the Court of Appeal has no jurisdiction to entertain an appeal from a

566 *Opondo v R* [1978] KLR 25.

567 *Nathan Browne Birundu v Republic* High Court Criminal Application No 896 of 2001.

568 [1981] 22 Cr App R.

569 s 357(1) of the CPC. *Nemchand Govinji v Republic* [1954]21 EACA 236.

refusal of the High Court to grant bail pending an appeal to that Court.⁵⁷⁰

In *R v Shah*,⁵⁷¹ the Court was of the view and so held that bail-pending appeal may be cancelled for misbehaviour or misconduct. The High Court allowed an application by the State to cancel bail that had been granted notwithstanding that there is no specific law permitting such application. This was on clear evidence that the applicant had attempted to pervert the course of justice by trying to influence (bribe) one of the judges scheduled to hear the appeal.

If the person in whose favour bail or stay of execution is granted is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed will not be considered during the computation of his sentence unless the High Court or the subordinate Court passing the sentence so orders.⁵⁷²

In *Daniel Muhuti Kibera v Republic*,⁵⁷³ the Court of Appeal held that the appellate Court will grant bail pending a second appeal if it satisfied that there is a substantial point of law to be argued which could result in the conviction being quashed.

Where the accused is refused bail pending appeal, the hearing of the appeal ought to be given priority.⁵⁷⁴

8.11 ANTICIPATORY BAIL

Apart from the conventional forms of bail discussed above, which are clearly stipulated in the Criminal Procedure Code, there is another species of bail, a rather contentious and controversial one that the High Court has, on occasion, granted and the same is styled *bail pending arrest or anticipatory bail*.

Anticipatory bail is an order to admit a person to bail, issued before the person is arrested. It is bail in anticipation of arrest. Any person who suspects that he is about to be arrested on false or trumped-up charges, due to personal or political enmity or vendetta with someone, or who fears that a false case is likely to be built up against him, may move to Court for grant of bail in the event of his arrest, and the Court may, if it thinks fit, direct that in the event of such arrest, he shall

⁵⁷⁰ *Nemchand Govinji v Republic* [1954]21 EACA 236 & [1983] KLR 442.

⁵⁷¹ [1988] KLR 815.

⁵⁷² s 356(2) of the CPC.

⁵⁷³ [1991] 2 KAR 272.

⁵⁷⁴ Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya pp 93.

Bail

be released on bail. In essence, the applicant invites the court to arrest him and release him on bail and thereby pre-empt an apprehended oppressive apprehension in the hands of the police.

In the case of *W' Njuguna v Republic*,⁵⁷⁵ the High Court ruled on the question as to whether bail pending arrest had statutory or constitutional backing. It was held that the right to anticipatory bail, while not specifically provided for by statute, was nonetheless envisaged by section 84 (2) of the repealed Constitution. The court went on to say that the same had to be called out where there were circumstances of serious breaches of a citizen's rights by an organ of the state and that were it to wait for parliament to legislate the right to anticipatory bail, then the High Court would be shirking its responsibility as mandated by section 84(1). In granting anticipatory bail, the High Court exercises its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual.

Under the new Constitution it seems that the right to anticipatory bail can be located at article 22 which gives every person the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or threatened. It is noteworthy that under article 23(3) the High Court has power to grant *appropriate relief*. As such, anticipatory bail may not be viewed as one of the conservatory orders specifically mentioned but the list of what constitutes appropriate relief is not exhaustive so there is nothing to bar the court from granting it.

The grant of anticipatory bail does not give the person immunity from appearing before the police or any authority who would wish to question him in connection with the commission of a certain offence. He would still be required to report to the police and co-operate with the law enforcement agencies as they conduct the investigations, but safe from arrest.

8.12 CONDITIONS THAT MAY BE IMPOSED BY COURT

When granting anticipatory bail, and in recognition that such bail is an unusual truncation of the investigatory process, the court may impose conditions in the light of the facts of the particular case, as it may think fit, including:

- (a) A condition that the person shall make himself available for interrogation by the police officer as and when required;

575 [2004] 1 KLR 520 See also, *Cherere v Republic* [2004]eKLR (Misc. Crim. Appl. 553 of 2004).

Essentials of Criminal Procedure in Kenya

- (b) A condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (c) A condition that the person shall not leave jurisdiction without the prior permission of the Court.

Anticipatory bail is not a blanket order. The applicant must show, by disclosing special facts and events that he has reason to believe that he may be arrested for a bailable offence so that the Court may take care to specify the offence or offences in respect of which alone the order will be effective. The order given is not a blanket one covering all other offences.

An applicant is free on bail as long as the same is not cancelled. The Court may direct that any person who has been released on bail be arrested and commit him to custody on an application moved by the complainant or the prosecution.

8.13 RATIONALIZATION OF BAIL

The passage of the new Constitution rendering all offences bailable has already engendered legal controversies and produced rulings by judges that are contradictory in fact or are potentially so. The judges who have dealt with the subject, still new, of considering bail for defendants facing capital charges have invariably and perspicaciously expressed the need for clear guidelines to govern bail in Kenya

Justice F. Ochieng in *Republic v Joseph Wambua Mutunga and others*⁵⁷⁶ made observations for the passage of legislation to deal with the issue of bail as other countries such as Eritrea, Ethiopia, Uganda, South Africa, Brazil, Ghana, Namibia, Malawi and Tanzania had done.⁵⁷⁷ He went on to say that such legislation would put in place structures and instruments to assist the judiciary in ensuring that accused persons who are granted bail do turn up for trial and guide the courts on the manner in which they should actualize the right to bond or bail. He also stated as a practical matter:

...it would be remiss of the court to nonetheless grant bail in situations where there was no way of ensuring that the accused later attended his trial.

In some jurisdictions, an accused person may be fitted with a gadget such as a bracelet or a tag, which will ensure that he does not leave the jurisdiction of the court. In

⁵⁷⁶ Criminal Case No 23 of 2008

⁵⁷⁷ In Malawi, there is the "Bail (Guidelines) Act" while in Uganda they enacted the "Trial on Indictments Act", said the judge.

Bail

the event that he should either attempt to leave the jurisdiction without lawful authority or that he tries to tamper with the gadget, it would immediately trigger off an alarm in the nearest police station. For such gadgets to be introduced in Kenya, appropriate legislation would be necessary. In some other jurisdictions, the accused would be discouraged from jumping bail because he would thereafter be unable to carry out most transactions. What discourages him from jumping bail is because he is aware that his Social Security Number is necessary for these transactions. Therefore he would either be revealing his exact location or he might have his access blocked. Perhaps Kenya could explore how best to utilize our Personal Identification Number.

These options could be explored by the legislature which may thereafter put in place an appropriate legal framework to govern bail.

On his part, Justice Ibrahim in *Republic v Mgunya and another*⁵⁷⁸ also addresses the issue thus:

Our new law has only come into force from 27 august 2010. There are no rules or procedures which have been passed or even suggested on how bail for capital offences have to be made. ... In some countries or jurisdictions there are statutory procedures for the evaluation of bail applications and the criteria to be used. In others, there is a practice that affidavit evidence be tendered and considered when considering a bail application.

Other than dealing with the novel issue of bail in capital cases, the legislation or guidelines, which the two judges quite properly view as urgent desideratum, should also address the critical issue of enforcing attendance by the category of offenders who, by dint of article 49(2), cannot be remanded in custody pending trial.

Even where the question is not whether bail should be granted, and while appreciating that its incidence and applicability has been extended to cover non-traditional areas such as bail pending arrest and now capital offences, there still is a measure of inequity in its practical operation. Way too many accused persons, mostly the poor and the marginalized, who are often unrepresented, languish in pre-trial custody either because they were not granted bail or were unable to raise the same.

Considering that the vast majority of Kenyans, especially those in conflict with the criminal law, are persons of humble means, a less than humane, or compassionate, approach to the question of bail only fuels the obvious inequalities

578 *Supra*.

Essentials of Criminal Procedure in Kenya

and imposes a heavy burden on the poor. Many of these may be unemployed and therefore unable to raise the cash bail imposed by the court. Further, as their family, friends and associates are similarly situated, they may be unable to offer cars and lands and houses as security for the simple reason that they own none, with the effect that bail becomes an empty shell devoid of succour to them.

It is submitted that judicial officers should be more ready to grant bail on terms that are more readily capable of being met by the individuals before them. They may be poor but pose minimal or nil flight risks. As such, it is a veritable scandal that prison cells should be bursting at the seams with people whose only confirmed crime is their poverty.

CHAPTER NINE

THE TRIAL PROCESS

9.1 APPEARANCE OF PARTIES

After an accused person appears in Court in obedience to summons or under arrest and pleads not guilty to the charge, the stage is set for the court to hear the case with a view to determining or establishing whether the complaint against the accused is true. It may hear the complainant and his witnesses as well as receive any other evidence immediately after the plea or on such date as it may fix.

Where the complainant, having had notice of the time and place appointed for the hearing of the charge does not appear, the Court must acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit. In the latter event, the Court may release the accused person on bail, remand him in prison or take security for his appearance as it thinks fit.⁵⁷⁹

Since an acquittal under section 202 of the Criminal Procedure Code is a penal default mechanism leading to the dismissal of the prosecution case for non-appearance, it ought to be used sparingly. In *Republic v Mwaura Ikego and another*,⁵⁸⁰ it was held that the term *complainant* under section 202 of the Code includes the prosecutor and that the provision is not intended to cover a situation where a prosecutor does come to Court but says the trial cannot proceed because some witnesses have not turned up.

In *Attorney General v Shimanyula*,⁵⁸¹ Bosire J, held that once a court decides to proceed with a matter on the hearing date, it cannot proceed to acquit an accused under section 202 of the Criminal Procedure Code because witnesses did not turn up. Rather, it must ask the prosecutor to tender evidence in support of the charge, and to proceed to acquit the accused for lack of evidence under section 210 of the Criminal Procedure Code, if he fails to tender any evidence in support of the charges. It is a jurisdictional question and it would follow that for a case that is already part-heard, with some prosecution witnesses having previously

579 s 202 of the CPC.

580 [1979] KLR 209.

581 [1990] KLR 157.

testified, the absence of a prosecutor and/or witnesses can only lead to a ruling on whether or not a case has been established under section 210 and never an acquittal, under section 202.

If at the time appointed for the hearing of the case both the complainant and the accused person appear before the Court which is to hear and determine the charge, or if the complainant appears and the personal attendance of the accused person has been dispensed with, the Court must proceed to hear the case.⁵⁸² The ideal situation as contemplated in the Criminal Procedure Code is that the trial of a criminal case should commence and be completed timeously. It should, in fact, proceed on a day to day basis to completion. Given the statutory requirement of expeditious disposal of cases, it is a serious incongruity that criminal cases take notoriously long to be concluded.

9.2 ADJOURNMENTS

The Court may, before or during the hearing of a case, adjourn the hearing to a certain time and place. Any such time and place must be appointed and stated in the presence and hearing of the party or parties or their respective advocates. The Court may allow the accused person to go at large, commit him to prison, or may release him upon his entering into a recognizance with or without sureties. Whereas the Criminal Procedure Code clearly stipulates that an adjournment must not be for more than thirty clear days, or, if the accused person has been committed to prison, no more than fifteen clear days,⁵⁸³ the actual position is that these time-lines are invariably honoured only in their breach. It is not unusual for cases to be adjourned for three months or longer.

Instead of the hearings proceeding within the stated times, a practice has emerged in ostensible compliance. After every fortnight, the case of a remanded accused has to be mentioned in Court and in any other case, after thirty days. The purpose of mentions, other than the pseudo compliance with the provisions of the Criminal Procedure Code is to enable the Court to keep track of the case and to see the accused person. The mention also affords the accused persons, particularly those in remand, an opportunity to air any grievances or complaints and the Court to make any necessary orders. The practice also enables the Court to make an order for further remand of the accused person in prison. Hence the Court

⁵⁸² *Ibid*, s 203.

⁵⁸³ s 205(1) of the CPC (In High Court, see s 283).

should ensure that the accused person physically appears in Court.

This judicial function should not be delegated to Court clerks.⁵⁸⁴ In *Okello v Republic*,⁵⁸⁵ the High Court stated that the holding of mentions is a form and manner of conducting judicial business and is not a merely administrative exercise. It should not, however, be converted into a full-fledged hearing for, as was stated by the Court of Appeal in *Patrick and another v Republic*,⁵⁸⁶ mention of a criminal case does not constitute a trial.

Mentions appear to be of doubtful utility in cases other than where the accused is in remand. With so many cases having to be mentioned, the court rooms, corridors and registries are inevitably more congested and the courts spend inordinate amounts of time dealing with routine roll-calls of accused persons or dealing with proceedings consequent to the mentions such as issuance of warrants of arrest of the absent and the hearing of explanations while the core function of dispensing justice by hearing witnesses and taking evidence, is delayed.

The right to adjournment is available to both the prosecution and the defence. From the point of view of the defence, the legal basis for adjourning the proceedings is the Constitution which guarantees the accused “adequate time and facilities for the preparation of his defence.”⁵⁸⁷ The Court therefore has to balance the right to adequate time for preparation of the defence on the one hand and the necessity of a timely trial, on the other.

Section 205 of the Criminal Procedure Code confers a judicial discretion on the Court to grant or refuse an adjournment. This discretion has to be exercised judicially depending on the circumstances of each case.

In *Mugema v Republic*,⁵⁸⁸ the accused applied for an adjournment at the close of the prosecution case because the advocate he had engaged to conduct his case had not turned up in Court. The trial court ruled that the accused had not informed it at the commencement of the trial of his intention to be represented by an advocate and that he had a proper opportunity to cross examine the prosecution witnesses. The court accordingly directed him to give his defence, which he

584 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya.

585 [2001] KLR 489.

586 [2003] 1 EA 50 See also the cases of *Kwua v Republic* [2005] 2 KLR 156, *Elerema and another v Republic* [2003] KLR 537.

587 Article 50(2)(c) of the Constitution.

588 [1967] EA 676.

Essentials of Criminal Procedure in Kenya

did. On appeal, it was held that the Appellant had taken proper steps to engage an advocate but through no fault of his the advocate had not appeared. In the circumstances, the appellant ought to have been allowed an adjournment to enable him to have an advocate represent him.

Neither the prosecution nor the defence is entitled to indefinite adjournments, as this would undermine the right to trial within a reasonable time and would be contrary to the public interest need for an end to litigation. On the other hand, adjournments ought not to be denied off hand since such denial may undermine the right to adequate time for the preparation of a defence⁵⁸⁹ and could even lead to a failure or miscarriage of justice if a strictly disciplinarian approach to trial were adopted at the expense of substantive truth-finding.

Where a case has been adjourned to a date agreed upon between the parties, the hearing date ought not to be altered without the involvement and consent of all the parties.⁵⁹⁰

If the accused person does not appear before the Court which made the order of adjournment, the Court may, unless the accused person is charged with a felony, proceed with the hearing or further hearing as if the accused were present while the complainant's absence may entitle the Court to dismiss the charge with or without costs.⁵⁹¹ The power to proceed in the absence of the accused is one that the courts use very sparingly since the presence of an accused person at his trial is fundamental. What ordinarily happens is that the court issues a production order for an accused who is in remand or issues a warrant of arrest against an accused who is out on bond and also calls upon his surety, if any, to produce him in court. It is only where all measures to procure the attendance of the accused person have been exhausted without success that the court embarks on a default hearing.

Similarly, and in keeping with the need to balance competing interests so as to ensure that substantial justice is done and seen to be done, hardly would a court dismiss a case and acquit an accused person on account of the complainant's absence unless the same appears to be deliberate and repeated. The court would first give the prosecution and the investigator sufficient opportunity to seek and produce the complainant. This deliberate caution is useful as a safeguard against

589 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya pp 40.

590 *Ruthi v Republic* [1985]KLR 373.

591 s 206(1) of the CPC.

the temptation to obstruct the cause of justice by engineering the disappearance or unavailability of the complainant.

A proper reading of both sections 205(1) and 206(1) of the Criminal Procedure Code reveals that the court in adjourning a hearing is at perfect liberty to appoint a place, other than a court house, for hearing hence the deliberate use of the expression, adjourning the hearing to “a certain time and place.” Thus, a court may adjourn a hearing to the locus of a crime for a site visit, or even to a hospital⁵⁹² for purposes of taking the evidence of a witness who may be unable to come to court.

Should the court proceed and convict the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.⁵⁹³ This provision is designed to soften the rigours of too strict an adherence to procedure which could undermine the substance of justice.

If the accused person who has not appeared is charged with a felony, or if the Court refrains from convicting the accused in his absence, the Court must issue a warrant for the apprehension of the accused person and cause him to be brought before the Court.⁵⁹⁴

9.3 CASE FOR THE PROSECUTION

When both parties are present and the trial commences, the prosecutor opens the case against the accused person before proceeding to call witnesses and adduce evidence in support of the charge.⁵⁹⁵ The prosecution starts because it is the one that bears the onus of proof. Even in those instances where a statute casts the burden of proof on the accused person, the Republic must first lay some factual basis by calling witnesses before the burden of proof shifts to the accused person.⁵⁹⁶

The opening of the case takes the form of a brief address by the prosecutor in which he provides an outline of and a guide to the case as well as presents a summary of the facts and theory of the prosecution case. Whereas an opening address is not expressly mentioned in respect of trials before the subordinate court, section 300 of the Criminal Procedure Code provides for the same in mandatory terms. It is

592 This was one of the grounds of appeal in *John Faustin Kinyua v Republic* HC Cr Appeal No 305 of 2009.

593 *Ibid*, s 206(2).

594 s 206(4) of the CPC.

595 *Ibid*, s 300.

596 *Prabulal v Republic* [1971] EA 52.

a practice of signal utility and one that should be encouraged and enforced as it helps clarify matters from early on for the benefit of all parties and also serves to improve trial advocacy skills.

After the opening address, the prosecution calls its witnesses in sequence usually beginning with the complainant and concluding with the Investigating Officer. The prosecutor determines the order in which witnesses are to appear before the Court.⁵⁹⁷

Each witness called is first sworn or affirmed and then led in testimony by the prosecutor. Thereafter, the witness is subjected to cross-examination by the accused person or his advocate before being re-examined by the prosecutor,⁵⁹⁸ where necessary.⁵⁹⁹

9.4 MODE OF TAKING AND RECORDING EVIDENCE

The evidence of each witness is taken down in writing or on a typewriter in the language of the Court by the magistrate or in his presence and hearing and under his personal direction and superintendence. It must be signed by the magistrate and it forms part of the record. Such evidence is taken down in narrative form, but the magistrate may take down or cause to be taken down any particular question and answer.⁶⁰⁰

In the case of *Mohamed v Republic*,⁶⁰¹ the Court of Appeal held that while the recording of a *voir dire*⁶⁰² in the form of questions and answers may be appropriate in situations where there is an elaborate recording system with shorthand personnel and electronic recording as in England, the requirement for recording proceedings in Kenya is still long-hand and it is not mandatory to record both the questions and answers from the witnesses, unless in the circumstance of any particular case, there is need for emphasis.

Notwithstanding the long-hand requirement, a record of any proceedings at a trial by or before a magistrate may be taken in shorthand if the magistrate so directs and a transcript of the same shall be made and form part of the record, if

597 *Roy Richard Elirema and another v Republic* CA Criminal Appeal No 67 of 2002.

598 *Supra* nt 536, s 302.

599 See the case of *Nzivo v Republic* [2005] 1 KLR 699.

600 *Supra*, s 197(1) of the CPC.

601 [2005] 2 KLR 138.

602 Under s 19 of the Oaths and Statutory Declarations Act.

The Trial Process

the magistrate so orders.⁶⁰³ These provisions for taking of evidence in long hand or short hand seem wholly inappropriate and anachronistic in a highly technologizing world where the record and the judges and magistrates need to be rescued from each other.

A witness has a right to ask that his evidence be read over to him and the magistrate must cause that evidence to be read over to him in a language which he understands⁶⁰⁴ and not merely in the language of the court, which is strictly English for the High Court and either English or Swahili for the subordinate courts.⁶⁰⁵

Whenever any evidence is given in a language not understood by the accused, and he is present in person, it must be interpreted to him in open Court in a language which he understands.⁶⁰⁶ If he appears by advocate and the evidence is given in a language which is not understood by the advocate, it must be interpreted to him in English.⁶⁰⁷

When documents are put in for the purpose of formal proof, it is in the discretion of the Court to interpret as much of them as appears necessary.⁶⁰⁸

When a magistrate has recorded the evidence of a witness, he may also record such remarks as he thinks material respecting the demeanour of such witness whilst under examination.⁶⁰⁹ However, such remarks should not be taken in isolation or given undue or prejudicial weight. In *Byamungu s/o Rusiliba v Republic*,⁶¹⁰ it was held that an impression as to the demeanour of a witness ought not to be made without testing it against the whole evidence in question.

It is not necessary for the prosecution to call a multiplicity of witnesses, some of whom may be merely cumulative and repetitive. It is enough to call such number as are sufficient to prove its case. Where, however, the prosecution fails to call a material witness without any apparent reason, the Court is entitled to presume or infer that the evidence which that witness would have given would, if produced, be unfavourable or adverse to that party as was pointed out in *Bukenya v Uganda*.⁶¹¹

603 Supra nt 541, s 197(2).

604 *Ibid*, s 197(3).

605 *Ibid*, s 198(4).

606 *Ibid*, s 198(1).

607 *Ibid*, s 198(2) .

608 *Ibid*, s 198(3).

609 *Ibid*, s 199.

610 [1951] 18 EACA 233 See also *Musau v Republic* [1980] KLR 54.

611 [1972] EA 549 See also *Nguku v Republic* [1985] KLR 412 and *Mwangi v Republic* [1984.KLR 595.

9.5 CLOSE OF PROSECUTION CASE

Once the prosecution has called all the witnesses and tendered all the evidence it intended to, it closes its case whereupon the court has to determine whether a *prima facie* case has been established but if it closes its case prematurely, for example due to refusal of an adjournment to call further witnesses, it is desirable to note that fact on record.⁶¹²

In *Ramanlal Bhatt v Republic*,⁶¹³ the former Court of Appeal of East Africa held that a *prima facie* case is one which:

A reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is given by the defence.

If, after considering the arguments and submissions, the Court finds that the prosecution has not made out such a case against the accused person to require that he be put on his defence, the Court shall make a finding of not guilty, dismiss the case and acquit the accused person forthwith.⁶¹⁴ That determination is a judgment in law, hence it must be in writing and must state the points of decision and the reasons therefor.⁶¹⁵

In *Wanjiku v Republic*,⁶¹⁶ the High Court stated that failure of the Court to make a ruling on whether or not an accused person has a case to answer at the close of the prosecution case is an incurable defect.

If the Court finds that a *prima facie* case has been made out against the accused person sufficiently to require him or her to make a defence, the stage is set for the hearing of the defence case.⁶¹⁷ This determination, unlike the one of no case to answer, which must be elaborate in setting out the reasons for the accused person's acquittal, is usually expressed in a single sentence. This is to avoid the appearance of having made a determination of guilty while at the same time inviting the accused to tender his defence.

When the evidence of the witnesses for the prosecution has been concluded, the Court, if it considers that there is no evidence that the accused committed the

612 *Ibid*, pp 58.

613 [1937] EA.

614 s 210 of the CPC.

615 *Republic v Amirali* [1971] E.A. 116.

616 [2002] 1 KLR 825.

617 Bench Book for Magistrates pp 59.

offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of *not guilty*.⁶¹⁸ The case is subsequently dismissed and the accused acquitted.⁶¹⁹

9.6 CASE FOR THE DEFENCE

Once the Court determines that a *prima facie* case has been established, it must, one more time, explain the substance of the charge to the accused person and,⁶²⁰

- a) inform him of his right to give evidence on oath from the witness box on his own behalf and that if he does so he will be liable to cross examination
- b) inform him of his alternative right to make an unsworn statement from the dock
- c) ask him whether he has any witness to examine or other evidence to adduce in his defence
- d) remind him that he is under no obligation to say anything

Where the accused opts to give an unsworn statement, his or her statement should be recorded in full by the court and should not be cut short. The accused must be freely allowed to make his or her defence.⁶²¹ Further, the Court should not prompt the accused person to either add or subtract from an unsworn statement.⁶²²

In *Amber May v Republic*,⁶²³ the Court of Appeal held that an unsworn statement is not evidence as the term is generally understood because it has no probative value. However the statement should be taken to consideration in relation to the whole evidence.

In *Njoka v Republic*,⁶²⁴ the Court of Appeal reiterated these rights of an accused person to elect whether to remain silent, to make an unsworn statement, to give sworn evidence and to call witnesses be explained to him at the close of the prosecution case, when he is being put on his own defence. It held that these are fundamental rights of the accused and are meant to ensure a fair trial.

If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the prosecution may sum up the case against the accused person.

618 s 306(1) of the CPC.

619 See the case *Mohammed and 3 others v Republic* [2005] 1 KLR722.

620 *Supra* nt 560, s 211.

621 *Peter Kipkemoi Cheruiyot v Republic* CA Criminal Appeal No 131 of 1981.

622 *Augustine Chebon Cheruiyot v Republic* CA Criminal Appeal No 16 of 1982.

623 [1979] KLR 38.

624 [2001] KLR 175.

Essentials of Criminal Procedure in Kenya

If the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the Court shall call upon him to enter upon his defence.⁶²⁵

The accused person or his advocate may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. The accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case.⁶²⁶

Where the accused elects to call other witnesses, such accused has to give his or her evidence first, followed by the witnesses.⁶²⁷ This evidence is subject to the same rules as the prosecution in examination- in- chief, cross examination and re-examination.

The accused person is allowed to call witnesses under the same conditions and circumstances as that of the prosecution. Where the witnesses of the accused are not available in Court at a particular time, the Court may adjourn to allow them time to appear later unless it considers that their absence is due to any fault or neglect of the accused person. The Court may also issue process such as summons and take other steps to compel the attendance of such witnesses on behalf of the accused.

Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.⁶²⁸

If the accused person or his witnesses adduce evidence that introduces a totally new matter that the prosecutor could not, by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply thereto. This rebuttal evidence may take the form of recalling witnesses who had previously testified or calling new witnesses altogether and tendering new evidence which is subject to the usual rules as to examination and cross examination.

625 s 306(3) of the CPC.

626 *Supra* nt 531, s 307(1) .

627 *Andiazi and another v Republic* [1967] EA 813.

628 *Supra* nt 533, s 160.

In *Popat v Republic*,⁶²⁹ some evidence of rebuttal was led by the prosecution after the accused had given evidence but before all the defence witnesses had been called. It was submitted by the appellant that such rebuttal evidence should not have been called until after all the defence witnesses had testified. The Court of Appeal held that “there may well be cases where it is in the interests of justice that some prosecution evidence should be led in rebuttal at the earliest opportunity. In any event, it was a matter of discretion for the trial Court.”

9.7 COMPETENCE AND COMPULSION OF WITNESSES

The capacity of a witness to give evidence in a trial is governed by rules of competence and compellability.

Competence is the ability of a person to give evidence in a Court of law. All persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease (whether of body or mind) or any similar cause.⁶³⁰

A witness is said to be *compellable* if he is capable of being summoned to Court to give evidence or suffer a form of punishment upon refusal. If the Court is satisfied by evidence on oath that the person will not attend unless compelled to do so, it may at once issue a warrant for the arrest and production of the witness before the Court at a time and place to be therein specified.⁶³¹

If, without sufficient excuse, a witness does not appear in obedience to the summons, the Court, on proof of the proper service of the summons a reasonable time before, may issue a warrant to bring him before the Court at the time and place as shall be therein specified.⁶³²

A witness is not excused from answering any question as to any matter relevant to the fact in issue in any criminal proceeding, upon the ground that the answer to such question will incriminate, or may incriminate, such witness, or that it will expose such witness to a penalty or forfeiture of any kind. The law deals with such legitimate concerns by providing that no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.⁶³³

629 [1944] 11 EACA 56.

630 s 125(1) of the Evidence Act (Cap 80 Laws of Kenya).

631 146 of the CPC.

632 *Ibid*, s 145.

633 s 128 of the Evidence Act (Cap 80 Laws of Kenya).

9.8 ISSUE OF COMMISSION FOR EXAMINATION OF WITNESS

Whenever, in the course of a proceeding, the High Court or a magistrate is satisfied that the examination of a witness is necessary for the ends of justice, and that the attendance of the witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or magistrate may issue a commission to any magistrate within the local limits of whose jurisdiction the witness resides, to take the evidence of the witness.⁶³⁴

The magistrate to whom the commission is issued shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in the case of a trial.⁶³⁵

The parties to a proceeding in which a commission is issued may respectively forward any interrogatories in writing which the Court or magistrate directing the commission may think relevant to the issue, and the magistrate to whom the commission is directed shall examine the witness upon those interrogatories.⁶³⁶

Any such party may appear before the magistrate by advocate, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the witness.⁶³⁷

The mechanism of commissions for the examination of witnesses is a prime demonstration that the right of an accused person to be present when evidence is being given against him is not an absolute one. The Constitution itself does not promise or contemplate an American-style face to face, eyeball-to-eyeball confrontation between an accused person and his accuser. In recognition that the physical presence of witnesses may not, in some cases, be possible, it is arguable that it is doctrinally acceptable for a court to receive their testimony by other means such as video link, or teleconferencing, which are able to avail critical testimony while at the same time preserving the fair trial rights of an accused person.⁶³⁸

634 *Supra* nt 560, s 154(1) .

635 *Supra* nt. 568, s 154(2).

636 *Ibid*, s 155(1).

637 *Ibid*, s 155(2).

638 This was first put to the test before the Anti-Corruption Court in the case of *Republic v Livingstone Ngare* ACC No.5 of 2002, where some two prosecution witnesses of doubtless importance could not travel from the United States of America, fearing for their own safety and the prosecution sought to have their evidence received in Nairobi via video link.

9.9 SWEARING AND AFFIRMATION

Every witness in a criminal cause or matter must be examined upon oath, and the Court before which any witness shall appear shall have full power and authority to administer the usual oath.⁶³⁹

A witness who submits to the oath has to be sworn on a Holy Book such as a Bible, the Koran or the *Gita*. The oath takes the following form,⁶⁴⁰ *"I . . . do swear that the evidence I shall give to this Court touching the matter in issue, shall be the truth, the whole truth and nothing but the truth. So help me God."*

Where an oath has been duly administered and taken, the fact that the person to whom it was administered had as the time of taking the oath no religious belief shall not affect the validity of the oath.⁶⁴¹

9.10 AFFIRMATIONS

Where a witness objects to being sworn either on the basis of lack of religious belief or that the taking of an oath is contrary to his or her religious belief, such witness shall be permitted to make a solemn affirmation instead of taking an oath.⁶⁴² The legal effect of affirmation is the same as that of an oath.⁶⁴³

An affirmation avoids any words of imprecation or calling to witness⁶⁴⁴ and it takes the following form,⁶⁴⁵ *"I . . . do solemnly, sincerely and truly declare and affirm that the evidence I shall give in this Court, touching the matters in question, shall be the truth, the whole truth and nothing but the truth."*

9.11 EXAMINATION

A Court may, at any stage of a trial or other proceedings, summon or call any person as a witness. It may examine any person in attendance though not summoned as a witness; or recall and re-examine a person already examined if the evidence of such person appears to it essential to the just decision of the case. Where the court recalls or permits the recall of a witness, then the prosecution or defence has a

⁶³⁹ *Ibid*, s 151.

⁶⁴⁰ Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya pp49.

⁶⁴¹ *Ibid*.

⁶⁴² *Ibid*.

⁶⁴³ s 15 of the Oaths and Statutory Declarations Act (Cap 15 Laws of Kenya).

⁶⁴⁴ *Ibid*, s 16.

⁶⁴⁵ *Supra* nt 572.

right to cross examine any such person and the Court shall adjourn the case for such time (if any) as it thinks necessary for the cross examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.⁶⁴⁶

At the commencement of the trial, it is advisable to request both the prosecution and defence witnesses who are yet to testify to stay outside the Court while a witness testifies. The Court should not, however, reject the evidence of a witness merely because he was in Court when other witnesses were testifying. His evidence should be taken and the fact of his prior inopportune presence in Court only goes to the weight to be attached to such evidence as was held in *Waithaka and another v Republic*.⁶⁴⁷

There are three stages of examining witnesses:⁶⁴⁸

- a. The direct examination of a witness by the party who calls him, referred to as the **examination-in-chief**.
- b. The examination of a witness by the adverse party, referred to as the **cross-examination**.
- c. Where a witness has been cross-examined and is then examined by the party who called him, the **re-examination**.

9.11.1 Examination in Chief

The object of examination in chief is to obtain testimony in support of the version of the facts in issue or relevant to the issue for which the party calling the witness contends.⁶⁴⁹

The witness is asked questions relevant to the issue before Court in their natural sequence. Questions regarding his personal opinion or points of law may not be asked. Ordinarily, a witness may not read the evidence from a statement he previously recorded but he may refresh his memory from it or from notes, so long as the same were written contemporaneously with or shortly after the event he is testifying about.⁶⁵⁰

Leading questions i.e. questions which obviously suggest the desired answer

646 s 150 of the CPC.

647 [1972] EA 184, Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya.

648 *Supra*, s 145.

649 Tapper C (1995) Cross and Tapper on Evidence (8th edition) Butterworths.

650 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13).

or assume the existence of disputed facts which the witness has been called to testify about are normally not allowed in examination in chief. Such questions are only allowed in the formal introductory part of the testimony.⁶⁵¹

9.11.2 Cross Examination

All witnesses are subject to cross examination by the adverse party or his advocate.⁶⁵²

The Court has a positive duty, where the accused is not represented by an advocate, to invite the accused to cross-examine the witnesses of the prosecution, and the Court is required to record the answer he gives.⁶⁵³ This provision, which is acknowledgment of the disadvantage at which an unrepresented accused stands, is intended to level the playing field and its efficacy must lie in the court's ability to appreciate its fair trial implications and its concomitant duty to play a more active and didactic role.

Cross examination is one of the principles of fair hearing and a denial of this right to the accused will vitiate any resultant conviction.⁶⁵⁴ In *Godhana v Republic*,⁶⁵⁵ the appellant had not been given the opportunity to cross examine his co accused and other prosecution witnesses. On appeal, the Court of Appeal at Mombasa held this to be a fatal misdirection.

So it was in *Kiarie and another v Republic*,⁶⁵⁶ where the appellants were tried and convicted in a magistrate's court for shop breaking. The only evidence against the second appellant was that of his co-accused, a tailor, who stated that he had brought the stolen property to him for the purpose of making clothes. On appeal, the High Court held that there was a fatal failure on the part of the trial magistrate to inform and accord the 2nd appellant of his right to cross examine the 1st appellant which resulted in a miscarriage of justice.

The purpose of cross examination is to first to elicit information concerning the facts in issue and that is favourable to the party on whose behalf the cross examination is conducted, and secondly to cast doubt upon the accuracy of the evidence in chief against such party.⁶⁵⁷

651 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya.

652 s 302 of the CPC.

653 *Ibid*, s 208(3).

654 *Ezekiel Nyaga and 3 others v Republic* CA Criminal Appeal No. 9 of 1985.

655 [1991]KLR 417.

656 [1986] KLR 281.

657 Cross and Tapper op cit.

Leading questions are allowed in cross examination.⁶⁵⁸

9.11.3 Re-examination

After a witness has been cross examined, the party calling that witness may put questions to him. There are strict limits to the type of questions which may be put in re-examination. Leading questions may not be put. It must be confined to matters that only arose during cross examination. New matters can only be introduced with leave of Court.⁶⁵⁹

When the evidence of both the accused and the prosecution has been adduced, their witnesses called, submissions are allowed wherein both sides are supposed to summarize their cases.⁶⁶⁰

9.12 DIFFICULT WITNESSES:

There are two types of witnesses who present difficulties to the party who calls them as well as to the court, namely

- a) hostile witnesses and;
- b) refractory witnesses

a) *Hostile Witnesses*

A **hostile** witness is one who gives evidence that is contrary to that which the party that called him wishes to rely on to support their case.

In *Coles v Coles*,⁶⁶¹ Sir J. P. Wylde defines a hostile witness as one who, from the manner in which he gives evidence, shows that he is not desirous of telling the truth to the Court. It is for this reason that under our Evidence Act,⁶⁶² the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross examination by the adverse party.⁶⁶³ This is referred to as *declaring a witness hostile*.

Such a move has far reaching consequences and in practice, a party should exercise great caution and circumspection and weigh his options carefully before taking it and various cases demonstrate the point:

658 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya 52.

659 *Ibid.*

660 s 307 of the CPC.

661 [1866] LRIP & D 70.

662 Cap 80 Laws of Kenya.

663 *Ibid*, s 161.

In *Alowo v Reublic*,⁶⁶⁴ the Court held that the basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him to be unreliable and this renders his evidence of negligible value.

In *Batala v Uganda*,⁶⁶⁵ the Court succinctly stated that:

[Leave] . . . enables the party calling the witness to cross-examine him and destroy the evidence. If a witness is unreliable, none of his evidence can be relied on when given before or after he was hostile and can be given little or no weight.

In *Shiguye v Republic*,⁶⁶⁶ the Court said that the effect of declaring a witness as hostile is to render his whole evidence untrustworthy. It said:

[A]fter having declared Shizya a hostile witness, the effect would be that Shizya was an unreliable witness, whose evidence would not be accepted by Court. All parts of the evidence of a witness declared hostile would be rejected as untrustworthy, not only some parts. The purpose of having a witness declared hostile by the party who calls him is to discredit him completely.

And in the case of *Abel Monari Nyamamba and 4 others v Republic*,⁶⁶⁷ the Court of Appeal said, “Obviously no Court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element reasonable for doubt.”

b) Refractory Witness⁶⁶⁸

This refers to any person who, appearing either in obedience to a summons or by virtue of a warrant, or being present in Court and being verbally required by the Court to give evidence without offering sufficient excuse for his obstinate, intransigent or uncooperative conduct or neglect –⁶⁶⁹

- (a) refuses to be sworn; or
- (b) having been sworn, refuses to answer any question put to him; or
- (c) refuses or neglects to produce any document or thing which he is required to produce; or
- (d) refuses to sign his deposition,

⁶⁶⁴ [1972] EALR 324.

⁶⁶⁵ [1974] EA. 402.

⁶⁶⁶ [1975] EA 191.

⁶⁶⁷ [1996] eKLR (Criminal App No. 86 of 1994).

⁶⁶⁸ s 152 of the CPC.

⁶⁶⁹ s 152(1) of the CPC.

In dealing with such a witness, the Court may adjourn the case for any period not exceeding eight days, and may in the meantime commit him to prison, unless he sooner consents to do what is required of him.

If the person, upon being brought before the Court at or before the adjourned hearing, again refuses to do what is required of him, the Court may again adjourn the case and commit him for the same period and so again from time to time until the person consents to do what is so required of him.⁶⁷⁰

Such person is also liable to any other punishment or proceeding for refusing or neglecting to do what is so required of him.⁶⁷¹

9.13 PENALTY FOR NON-ATTENDANCE OF WITNESS

A person summoned to attend as a witness who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the court, or who fails to attend after adjournment of the court after being ordered to attend, shall be liable by order of the court to a fine not exceeding five thousand shillings.⁶⁷²

The fine shall be levied by attachment and sale of movable property belonging to the witness within the local limits of the jurisdiction of the court.⁶⁷³

In default of recovery of the fine by attachment and sale, the witness may, by order of the court, be imprisoned as a civil prisoner for a term of fifteen days unless the fine is paid before the end of term⁶⁷⁴ but the High Court may remit or reduce a fine imposed by a subordinate court if good cause is shown.⁶⁷⁵

9.14 SPECIAL WITNESSES

Deaf and Dumb Witnesses

A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written, and the signs made, in open Court⁶⁷⁶ and evidence so given is deemed to be oral evidence.⁶⁷⁷

⁶⁷⁰ *Ibid*, s 152(2).

⁶⁷¹ *Ibid*, s 152(3).

⁶⁷² *Ibid*, s 149 (1).

⁶⁷³ *Ibid*, s 149 (2).

⁶⁷⁴ *Ibid*, s 149 (3). See also *Republic v Mohammed* [1990] KLR569.

⁶⁷⁵ *Ibid*, s 149 (4).

⁶⁷⁶ *Ibid*, s 126(1).

⁶⁷⁷ *Ibid*, s 126(2).

In *Hamisi v Republic*,⁶⁷⁸ the Court held that a deaf and dumb witness is not incompetent as a witness if he can be made to understand the nature of an oath and if intelligence can be conveyed to and from him by means of signs.

Children

A child of any age may be sworn as a witness in a criminal case provided that he appears to possess sufficient intelligence to understand the nature and obligation of the oath, for his competency depends on his understanding, not his age.⁶⁷⁹

A magistrate must satisfy himself concerning this point by conducting a *voir dire* before the child is sworn. If the magistrate is of the opinion that the child does not understand the nature of the oath, he may give unsworn testimony if he possesses sufficient intelligence to understand what he is doing.⁶⁸⁰

In *John Otieno Oloo v Republic*,⁶⁸¹ the Court of Appeal stated that the trial court, before swearing a child of tender years, should out of caution form an opinion on a *voire dire* examination whether the child understands the nature of an oath or not. Failure to do so could occasion a miscarriage of justice had that been the only witness on the issues that were before the Court.

In *Gabriel v Republic*,⁶⁸² the Court of Appeal held that it is always the duty of the Court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that a child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between truth and falsehood.

Even where a child does not understand the nature of an oath, he may, nonetheless, give unsworn evidence. This was dealt with in *Musikiri v Republic*,⁶⁸³ where the Court stated that:

It is clearly the duty of the Court under section 19 of Cap 15 in the determination of whether a child tendered as a witness understands the nature of an oath, if the finding on this question is a negative, to satisfy itself that the child is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of speaking

678 [1951] 18 EACA 217.

679 s 19 of the Oaths & Statutory Declarations Act (Cap 15 Laws of Kenya).

680 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13). See also the case of *Onserio v Republic* [1985] KLR 618.

681 [2009] eKLR, Criminal Appeal 350 of 2008.

682 [1960] EACA 159.

683 [1987] KLR 69.

Essentials of Criminal Procedure in Kenya

the truth. It is said that this is a condition precedent to the proper reception to the unsworn evidence of a child and it ought to appear on the face of record that this evidence was combined.

The general rule is that an accused may not be convicted of the offence charged against him unless the evidence of a child is corroborated by some other material evidence implicating him.⁶⁸⁴ The Court of Appeal referred to this as a sound rule of practice rather than a rule of law in *Mohamed Saeed Akrabi v Republic*.⁶⁸⁵

In *Johnson Muiruri v Republic*,⁶⁸⁶ the High Court held that corroboration is only necessary where a child gives unsworn evidence.

The position however is different where the evidence given is that of a victim child of tender years. Such evidence, as was held in the case of *Mohamed v Republic*,⁶⁸⁷ need not be corroborated if the Court is satisfied that the child is telling the truth.

There is no definition in the Oaths and Statutory Declarations Act⁶⁸⁸ of the expression 'child of tender years' but in the absence of special circumstances the court takes it to mean any child of an age or apparent age of less than fourteen years. Under the Children Act,⁶⁸⁹ a child of tender years has been defined as that of below the age of ten years.

However whether a child is of tender years is a matter of the good sense of the court where there is no statutory definition as was held in the case of *Nywela v Republic*.⁶⁹⁰

The court further held that the decision whether or not to conduct a voir dire examination of a child of tender years rests with the trial court. If from its general assessment a trial court thinks a witness is not a child of tender years, an appellate court which did not have the same advantage as the trial court to see the witnesses will be in no firm position to find that the trial judge's exercise of discretion in accepting the witnesses' testimony without a voir dire examination was wrong.

684 *Johnson Muiruri v Republic* [1983] KLR 445.

685 [1956] 23 EACA 512.

686 [1983] KLR 445.

687 [2005] 2KLR 138.

688 (Cap 15 Laws of Kenya).

689 s 2.

690 [1989] KLR 452.

Lunatics

When in the course of a trial the Court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.⁶⁹¹ In *Muraya v Republic*,⁶⁹² the Court of Appeal held that there is imposed a duty on the Court to invoke this section of the Criminal Procedure Code in a trial when the issue of the unsoundness of the mind of an accused person arises.

Where the Court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.⁶⁹³

If the case is one in which bail may be taken, the Court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the Court or such officer as the Court may appoint in that behalf.⁶⁹⁴

For a case involving a non-bailable offence or if sufficient security is not given, the Court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the Court record or a certified copy thereof to the Minister for consideration by the President.⁶⁹⁵

Upon consideration of the record the President may by order under his hand addressed to the Court direct that the accused be detained in a mental hospital or other suitable place of custody, and the Court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the Court which found him incapable of making his defence orders him to be brought before it.⁶⁹⁶

In case a person detained in a mental hospital or other place of custody is found by the medical officer in charge of the mental hospital or place to be capable

691 s 162(1) of the CPC See *Kinyua v Republic* [2002] 1 KLR 256 and *Omae v Republic* Criminal Appeal No 1 of 2007.

692 [2001] KLR 50.

693 *Supra* nt 626, s 162(2).

694 s 162(3) of the CPC.

695 *Ibid*, s 162(4).

696 *Ibid*, s 162(5).

of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Attorney-General,⁶⁹⁷ who shall thereupon inform the Court which recorded the finding concerning that person whether it is the intention of the Republic that proceedings against that person continue or otherwise.⁶⁹⁸

If the Attorney-General intimates that it is the intention of the Republic that proceedings against that person continue, the Court shall order the removal of the person from the place where he is detained and shall cause him to be brought in custody before it. If otherwise, the Court shall forthwith issue an order that the person be discharged in respect of the proceedings brought against him and released from custody, but the discharge and release shall not operate as a bar to any subsequent proceedings against him on account of the same facts.⁶⁹⁹

9.15 WITNESS PROTECTION

The Witness Protection programme in Kenya is governed by the Witness Protection Act 2006,⁷⁰⁰ which originally created a unit under the Attorney General's Chambers in the State Law Office. It was soon realized that the devoid of statutory and operational independence and autonomy, the unit would be ineffectual. This led to far reaching amendments to the statute but its efficacy as a framework for the protection of witnesses and their families from intimidation and reprisals through provision of safe houses, change of identity, relocation and other novel interventions, is yet to be tested. This is especially so in cases involving radical evil or mass atrocities as was witnessed in Kenya's Post-Poll Violence of 2007/2008.

9.16 TRIAL OF CHILDREN

Modern developments in the law relating to children have brought to the fore the unique vulnerabilities of the young and led to the enactment of several child-centric international and municipal laws. In Kenya, the controlling statute is the Children Act,⁷⁰¹ which removes children in conflict with the law from the jurisdiction of ordinary courts and places them under special courts known as Children's Courts. The Children's Courts are constituted in accordance with the provisions of the Children Act⁷⁰² and are presided over by magistrates appointed by the Chief Justice who,

697 *Ibid*, s 163 (1).

698 *Ibid*, s 163 (2).

699 *Ibid*, s 163(3).

700 Which commenced on the 1 September 2008 See also Witness Protection Amendment Act (2010)

701 Act No.8 of 2001.

702 *Ibid*, s 73.

by notice in the *Gazette*, stipulates such magistrates' geographical jurisdiction.⁷⁰³

The Children's Courts have jurisdiction to hear any criminal charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years, and this has been recognized in the Criminal Procedure Code, which defines courts to include Children's Courts.⁷⁰⁴ Under the Children Act, there are special procedural provisions that are intended to afford children extra fair trial guarantees and safeguards.⁷⁰⁵

When in the course of any proceedings in a Children's Court or any Court other than a Children's Court it appears to the Court that the person charged, or to whom the proceedings relate, is over or under eighteen years of age, nothing shall prevent the Court, if it thinks fit, from proceeding with the hearing and determination of the case.⁷⁰⁶

Where any conviction or sentence made or passed by a Court other than a Children's Court is appealed against or is brought before the High Court for confirmation or revision and it appears that the person convicted was at the time of the commission of the offence under eighteen years of age, the High Court shall have power to substitute for the conviction a finding of and substitute for the sentence any other order.⁷⁰⁷

The foregoing safeguards are now part of the Constitution, which provides that every child has the right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time⁷⁰⁸ and separate from adults and in conditions that take account of the child's sex and age.⁷⁰⁹ Furthermore, a child's best interests are of paramount importance in every matter concerning the child.⁷¹⁰

703 *Ibid*, s 73(ii).

704 s 73(i) of the Children Act.

705 *Ibid*, see Part XIII, comprising ss 184-194.

706 *Ibid*, s 73(iii).

707 *Supra* nt 546, s 73(iv).

708 Art 53(1)(f)(i) of the Constitution.

709 *Ibid*, art 53(1)(f)(ii) of the Constitution.

710 s 53(2) of the Constitution.

9.17 TRANSFER OF CASES

Transfer of Cases where offence committed outside jurisdiction

Where a court is bereft of jurisdiction by reason of the complaint having arisen outside the local limits of its jurisdiction, it will transfer the case to the proper court.⁷¹¹ The transferring court will cause the accused person to be placed or continued in custody and delivered to the proper court, which shall treat him as if the complaint and other process had been taken before it.⁷¹²

A magistrate holding a subordinate court of the first class –⁷¹³

- (a) may transfer a case pending before him to any other magistrate in the same local jurisdiction.
- (b) may direct or empower a magistrate within his local limits to transfer a case pending before such magistrate for trial before another magistrate or to himself.

If in the course of any trial before a magistrate the evidence appears to warrant a presumption that the case is one which should be tried by some other magistrate, he shall stay proceedings and submit the case with a brief report thereon to a magistrate holding a subordinate Court of the first class empowered to direct the transfer of the case.⁷¹⁴

The High Court may, acting on a report of the lower Court, or suo motu, or on the application of a party interested,⁷¹⁵ order that a case be tried by a court ordinarily devoid of local jurisdiction but otherwise competent or that a particular case or class of cases be transferred from one subordinate court to another or to itself where:

- a) a fair and impartial trial is impossible before a particular subordinate court
- b) some question of law of unusual difficulty is likely to arise
- c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or
- d) that any such order will tend to the general convenience of the parties or witnesses; or
- e) that such an order is expedient for the ends of justice or is required by any provision of the Criminal Procedure Code

711 s 78(1) of the CPC.

712 *Ibid*, s 78(2).

713 *Ibid*, s 79.

714 s 80.

715 *Ibid*, s 81(2).

9.18 PRINCIPLES GOVERNING A FAIR TRIAL

The various provisions relating to trial that are contained in the Criminal Procedure Code must be tested for their propriety and utility against the overriding consideration of fairness. The desiderata for a fair trial are to be found at article 50 of the Constitution within the Bill of Rights.⁷¹⁶ These principles may be seen as the application of natural justice or due process to the criminal justice system and are a defining feature of a free and democratic society. So important is the right to fair trial that it is one of the four non-derogable rights which cannot be limited or alienated under any circumstances.⁷¹⁷

In *Pattni and another v Republic*,⁷¹⁸ the High Court stated that fair trial in the context of section 77 of the repealed Constitution does not refer to the merits or bona fides of the prosecution case. Rather it deals with the trial process, the decision making process, sometimes referred to as, “*procedural due process*.”

In the case of *Gisborne Herald Co. Ltd. v Solicitor General*,⁷¹⁹ the court held that fair trial values are a protection both for the public in respect to generality of cases as well as the particular case and to the accused in the particular case. Fair trial is not a purely private benefit for the accused as it implicates the public’s confidence in the integrity of the judicial system.

This was well captured in *Regina v Sussex Justices ex parte McCarthy*,⁷²⁰ thus:

[J]ustice must not only be done but must be manifestly seen to have been done. The infrastructure of safeguards of a fair trial in a legal system, which results in varying verdicts, is as important as the verdicts, because upon this is the system judged, and confidence in it reposed or compromised in the eyes of the society at large.

Locally, the High Court in *Eric Cheruiyot Kotut v Republic*,⁷²¹ stated that it had a supervisory jurisdiction under section 65⁷²² of the old Constitution and was entitled to move on its own motion to stop any unfair trial taking place in the lower Courts. The issue of a fair trial is central to the High Court’s supervisory jurisdiction.

716 Art 50(1) of the Constitution

717 *Ibid*, art 25(c)

718 [2001] KLR 264 See also *Koigi wa Wamwere v Attorney General* High Court Misc App No 574/90.

719 [1995] 3 NZLR 563.

720 [1924] 1 KB 256.

721 [2006] eKLR (Miscellaneous Civil Application No. 416 of 2006).

722 See s 165(6) of the Constitution

The principles of a fair trial were summarized by Nyamu, J in the case of *Republic v Subordinate Court of the 1st Class Magistratess and another Ex parte Yougindar Pall Sennik and another*⁷²³ as:

1. Right to equality before the law
2. Right to presumption of innocence
3. Right to a fair hearing
4. Right to equality of arms in adversarial proceedings
5. Right to be tried by a competent, independent and impartial tribunal established by law⁷²⁴

Let us now look at the principles or specific rights as provided by the Constitution in some detail:

(1) *Trial by an independent and impartial court*⁷²⁵

At the very heart of any effective adjudicatory system is the imperative of an independent and impartial court system. The judges need to be not only fair but also manifestly seen to be fair. The judiciary must, as Honourable Chief Justice Anthony Gubbay of Zimbabwe⁷²⁶ once put it:

interpret the laws of the land fairly and dispense justice impartially without fear or favour between individuals or the individuals and the State. In this way the judiciary makes a meaningful contribution to the maintenance of law and order and, consequently, the maintenance of peace within its jurisdiction.

It is trite that if the public generally loses confidence in the judiciary, the seeds of anarchy are sowed within society and it becomes a slippery descent to lawlessness.

Although the trial system is adversarial, the role of Court is not to be restricted to that of a passive arbiter. Its primary duty is to ascertain the truth. To that end, it is entitled to put questions to the witnesses to clarify any point or resolve any contradictions.⁷²⁷

The limit of the power of the Court to call witnesses on its own motion was

⁷²³ [2006] eKLR (Miscellaneous Application 652 of 2005).

⁷²⁴ The Judge proclaimed that,

“Any of the above infringements does seriously jeopardize the right to a fair trial and also the right to be presumed innocent.”

⁷²⁵ Article 50(1) as read with (2)(d) of the Constitution.

⁷²⁶ A Gubbay ‘The Independence of the Judiciary with Special Reference to Parliamentary, Control of Tenure, Terms and Conditions of Service and Remuneration of Judges: Judicial Autonomy and Budgetary Control and Administration’ in J Hatchard and P Slinn (eds) *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* Proceedings of the Latimer House Joint Colloquium June 1996

⁷²⁷ Bench Book for magistrates in Criminal Proceedings.

set out in *Murimi v Republic*.⁷²⁸ The Court held that the power vested in the Court to call witnesses must be read in conjunction with the requirement of the law that the prosecution must prove its case beyond reasonable doubt. It concluded that the above provision was not designed and should not be used to empower the trial Court upon the close of the prosecution case, to call a witness in order to establish a case against the accused person, except where the evidence is of a purely formal nature.

Ultimately the Court retains the residual discretion to control and regulate the conduct of the trial. It determines admissible or inadmissible, relevant or irrelevant evidence and that the questions to be put in examination in chief, cross examination and re-examination do not degenerate into an occasion for irrelevancies and filibuster.⁷²⁹

(2) *Right to expeditious justice*

Unreasonably prolonged court proceedings in a criminal case cannot be consistent with the requirements of a fair hearing. The Constitution requires that the trial must begin and conclude without unreasonable delay.⁷³⁰ This means that the trial should be commenced timeously or promptly and then proceeded with and decided without unreasonable delay notwithstanding that generally criminal cases are not subject to any statutory limitation.

In the case of *Republic v Attorney General and another ex parte Ng'eny*,⁷³¹ the High Court stated that if a prosecution does not afford an individual, “a fair hearing within a reasonable time by an independent and an impartial court. . .” it should be halted.

(3) *Right to a public trial*

Precisely because criminal trials implicate the most cherished rights of the citizens namely life and liberty and considering that the public has a definite interest in the outcome thereof, the Constitution requires that the same be held in public. This must mean at the very least that court premises and court proceedings should be open to all members of the public who may wish to attend and the press who would make them available to the wider public. It would not amount to a public

728 [1967] EA 542.

729 *Supra* nt 645, pp 53.

730 Article 50(2)(e) of the Constitution.

731 2001] KLR 653.

trial if held in chambers behind closed doors or if sessions are open only to persons with definite business to transact in court such as fellow accused persons, advocates, court orderlies and witnesses.

In recognition of the fact that a public hearing may hamper and impede instead of aiding the interests of justice and fairness, however, the Constitution has qualified this particular element by specifically providing that it does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.⁷³² Parliament is mandated to enact legislation providing for the protection, rights and welfare of victims of offences.⁷³³

(4) *Presumption of Innocence*⁷³⁴

One is presumed to be innocent until he is proven or has pleaded guilty. A full and proper appreciation of this ought to lead to a more humane and dignified treatment of accused persons by the police and the courts as persons deserving of appropriate respect and under no stigma since they have not been convicted of any offence.

(5) *Right to be informed of the charge, with sufficient detail to answer it*⁷³⁵

An accused person is to be informed, as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. This is meant to eliminate ambushes and undue secrecy in the criminal justice system and to provide clear enough and unambiguous information such as would enable him to make full answer thereto⁷³⁶ or, as the court held in *Kanda v Government of Malaya*.⁷³⁷

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused person to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

⁷³² *Ibid*, art 50(8).

⁷³³ *Ibid*, art 50(9).

⁷³⁴ *Ibid*, art 50(2)(a).

⁷³⁵ *Ibid*, art 50(2)(b).

⁷³⁶ *Wanjiku v Republic* [2002] 1KLR 825.

⁷³⁷ [1962] AC 322.

(6) *Right to adequate time and facilities for the preparation of his defence;*⁷³⁸

This must mean, at least, the opportunity to adequately prepare one's defence. It may take the form of reasonable adjournments where needed and reasonably sought, as well as opportunity to receive and view beforehand the evidence that the prosecution intends to adduce against the accused. The right to pre-trial discovery is now well established and the giving of the charge sheet, witness' statements, investigations diaries, experts' reports, copies of documents and exhibits is basic to every trial nowadays.

But it was not always so.

In *Juma and others v Attorney General*,⁷³⁹ the applicants were charged with various criminal offences and applied to the trial court for orders that the prosecution supply them with copies of statements made by the would be prosecution witnesses and copies of exhibits on which the prosecution would rely at the trial- in particular copies of exhibits taken from them by the police during the criminal investigation. The trial court refused the application and the applicants made a reference to the High Court complaining that their rights under the Constitution were in danger of being violated by the refusal. The High Court held that the provisions of the Constitution under consideration can have life and practical meaning only if the accused persons are given statements of persons who will or may be called to testify as witnesses for the prosecution as well as the copies of exhibits which are to be offered in evidence for the prosecution. The Court said:

We hold that the State is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence. In this connection it is for the prosecution to establish special circumstances upon which any limitation to the right of access may be based. The state must adduce evidence in individual cases to establish precisely what documents or statements or persons to be protected and the basis for such limitation. In other words the onus of establishing the justification for a limitation for any of the fundamental rights guaranteed by the protection of the law provisions of the Constitution must be on the party alleging such justification to derogate from the constitutional guarantees.

Under the new Constitution, this right has been expressly guarded in that the accused

⁷³⁸ Art 50(2)(c) of the Constitution.

⁷³⁹ [2003] 2 EA 461.

has a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.⁷⁴⁰ Furthermore, every citizen has the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom.⁷⁴¹ This provides a further basis for enforcing prosecutorial discovery.⁷⁴²

(7) *Right to chosen counsel*⁷⁴³

An accused person must be permitted to defend himself before the Court in person or by a legal representative of his own choice; and to be informed of this right promptly.

In the case of *Lima and another v Republic*,⁷⁴⁴ the Court said that every accused has the undoubted right to be defended by counsel. If an accused is deprived of that right through no fault of his own or of his counsel and a conviction follows, the conviction will be quashed on appeal.⁷⁴⁵

In *Ruhi v Republic*,⁷⁴⁶ the trial Court, in the absence of some of the advocates for the accused and of unrepresented accused persons, changed and brought forward the date fixed for further hearing of the case. In response the advocates withdrew from the case and some of the accused persons declined to participate further in the trial. Upon appeal, the ensuing conviction was quashed *inter alia* on the basis that the Constitution guaranteed an accused person the right to counsel, which had been breached.

The right to an advocate may be lost if not exercised reasonably. For example, an accused person is not entitled to indefinite adjournments of the trial to enable him to instruct an advocate. The Court only needs to satisfy itself that the accused person has had reasonable opportunity to instruct an advocate.⁷⁴⁷ Where the advocate for the accused behaves unreasonably or makes it impossible for the trial to proceed without undue delay, the Court may order the trial to proceed in the absence

740 Art 50(2)(j) of the Constitution.

741 *Ibid*, art 35(1)

742 As to whether the defence owes any duty of discovery, see the discussion on Prosecutions (Chapter Five)

743 *Ibid*, art 50(2)(g).

744 [1991] eKLR(Criminal Appeal No. 110 of 1991) .

745 See also *Mugema v Republic (Supra)*.

746 [1985] KLR 373.

747 Bench Book for Magistrates pp 38 See also *Yussuf Gitta v Republic* [1959] EA 21 and *Yusuf Ahmed v Republic* [1959] EA 615.

of the advocate without infringing on the right of the accused to an advocate: *Adiedo v Republic*⁷⁴⁸ By his or her own consent or conduct, the accused person can forfeit the right. Strictly speaking all the Constitution guarantees is a reasonable opportunity for the able and willing accused person to hire an advocate.

The right to counsel, like all rights, is not absolute and may be subject to the rights of other persons including of the advocate. In *Lockhart Smith v Republic*,⁷⁴⁹ an advocate applied to withdraw from acting for an accused person. The Court declined the application and ordered the advocate to remain in Court under threat of arrest if he left. On Appeal it was held that the Court cannot prevent an advocate from withdrawing from a case if for any reason he feels he is unable to continue to serve his clients' best interests. Although it is the practice for the advocate to ask leave from the Court to withdraw, in the final analysis the advocate is asking for that which cannot be refused.

(8) *Right to assigned counsel*

In recognition of the gravity of the offence and severity of the penalty, the Judiciary provides the indigent accused person with an advocate under the pauper brief system. This applies only to capital trials at the High Court and capital appeals at the Court of Appeal. This is in an attempt to level the playing field somewhat but it remains wholly gratuitous and does not proceed from obligation. A major failing of the system is that it does not provide succour to the majority of indigent accused persons who face the possibility of a death penalty on the charge of capital robbery in magistrates' courts across the land.

To remedy this, the Constitution provides that every accused person has the right to have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.⁷⁵⁰ The precise meaning and content of this right is yet to be pronounced upon. However, for it to make real change in the criminal justice system, it ought to mean that save for minor offences attracting no or perhaps extremely short prison terms, the State ought to provide legal representation for all persons who cannot afford to hire advocates. This view is informed by the fact that every criminal defendant potentially faces a sentence on conviction that would impact on his life or liberty and for him to face trial unrepresented would, *ipso facto*, result in substantial injustice.

748 [1969] EA 586.

749 [1965] EA 211.

750 Article 50(2)(h) of the Constitution.

(9) Right to Silence⁷⁵¹

Every accused person has the right to remain silent, and not to testify during the proceedings. This is in keeping with the time-honoured principles of innocence until proved guilty and its corollary, that the burden to prove criminal cases beyond reasonable doubt always rests with the prosecution and never shifts.⁷⁵² This really is a constitutional expression of the evidentiary rule that the accused person is not a compellable witness as against himself.

(10) Right to adduce and challenge evidence⁷⁵³

An accused person has the right to adduce and challenge evidence. He shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as those applying to witnesses called by the prosecution;

In the *Youngindar case* (supra), Nyamu J. said:

In the conduct of a case, especially a criminal case ... equality means identical treatment of the prosecution and defence throughout the trial. The derogation from the principles of equality is only allowed where differentiations are legitimate and hence lawful; provided they pursue a legitimate end and to deal with factual inequalities and are responsible in light of their legitimate end and to deal with and must also comply with the principles of legality, proportionality and democratic practice. Obviously this type of derogation has no relevance whatsoever in the conduct of the criminal trial.

And in *Henry Kimathi v Republic*⁷⁵⁴ the Court of Appeal held that the failure by a trial magistrate to assist the appellant in calling a witness in support of his alibi defence clearly amounted to a violation of his rights guaranteed by the Constitution.

(11) Right of non- self-incrimination⁷⁵⁵

An accused person has the right to refuse to say anything, disclose any information, produce any document or answer any question if such disclosure, production or answer would tend to incriminate him. This right is related to and is a continuation

751 *Ibid*, art 50(2)(i).

752 *Woolmington v DPP* [1935] AC 462.

753 *Ibid*, art 50(2)(k).

754 [2006] Eklr, Crim App No 10 of 2002.

755 Art 50(2) (l) of the Constitution.

of his right to silence both at the time of arrest and during the trial but is also unique in that it can be exercised or pleaded in aid notwithstanding that the accused may have chosen to speak generally. Thus, it may be raised in the course of police interrogation as well as in the course of testimony.

(12) *Right to interpreter*⁷⁵⁶

The accused is permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge. Connected herewith is the general right that whenever information is required to be given to him as part of the fair-hearing guarantee, the same shall be in a language that he understands.⁷⁵⁷ This presupposes translation or interpretation. The right of interpretation has received judicial endorsement in several instances including in *Abdalla v Republic*,⁷⁵⁸ where the Court of Appeal held that it is a fundamental right of the accused charged with a criminal offence to have the assistance of an interpreter.

(13) *Right against Retrospective Operation of Law (Res prospicit non respicit)*⁷⁵⁹

No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute an offence in Kenya nor constitute a crime under international law. With the express and automatic incorporation of the general rules of international law as well as any treaties or conventions ratified by Kenya by virtue of article 2 of the Constitution, it would seem that it is possible for persons to be accused and prosecuted for crimes under international law notwithstanding that they may not have been legislated against in Kenya as at the date of commission.

(14) *Right against Double Jeopardy*⁷⁶⁰

No person who shows that he has been tried by a competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence. Such a person would have the right to plead *autrefois convict* or

756 *Ibid*, art 50(2)(m)

757 *Ibid*, art 50(3).

758 [1989] KLR 456.

759 *Ibid*, s 50(2)(n).

760 *Ibid*, art 50(2)(o).

autrefois acquit, which are both pleas in bar of any such subsequent trial save upon the order of a superior Court in the course of appeal or review proceedings relating to the conviction or acquittal.

(15) *Right of exclusion of evidence*

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.⁷⁶¹ This is a categorical departure from a closed-eye policy on the part of the judiciary which is unconcerned about how evidence is obtained. Thus, evidence in violation of rights would be suppressed as being the fruit of a poisoned tree. It would seem, though, that not every violation would lead to exclusion but only such as the court determines to have a deleterious effect on the fairness of the trial.

(16) *Right to least severe sentence*⁷⁶²

An accused has the right, where the sentence prescribed for an offence has been changed from the time he committed the offence to the time of sentencing, to receive the benefit of the least severe sentence. This essentially means that if the punishment for an offence is enhanced by legislation during the pendency of proceedings, the accused on conviction will have the former, lesser sentence imposed. Similarly, even though a person commits an act or omission punishable by a certain sentence, at the time of sentencing he will receive a lesser one if the penalty reduces between charge and sentence.

(17) *Right to records*⁷⁶³

Every accused person, except one charged with any offence triable by summary procedures, is entitled during and in the course of the trial to a copy of the record of proceedings of that trial whenever he requests for the same. This means that the record ought to be available to an accused person or his legal representatives on a daily and continuous basis and is an essential prop to the right of adequate facilities. At the end of the trial and at a reasonable fee to be prescribed by law, an accused person has a right to a copy of the record of the entire proceedings. This should be availed within a reasonable period.

⁷⁶¹ Art 50(4) of the Constitution.

⁷⁶² *Ibid*, art 50(2)(p).

⁷⁶³ *Ibid*, art 50(5).

(18) *Right to Appeal or Review*

Every person who is convicted of an offence has a right to appeal to, or apply for review by, a higher court as prescribed by law.⁷⁶⁴ This is clearly in recognition of human fallibility which calls for a fresh and exhaustive review of the law and evidence.

(19) *Right to new trial*⁷⁶⁵

In a significant departure from the long established rule that the decision of the apex court has a ring of finality to it and is not amenable to reconsideration, the new Constitution provides that a person who is convicted of a criminal offence may petition the High Court for a new trial notwithstanding the dismissal of his appeal by the highest court to which he is entitled to appeal, or notwithstanding his failure or omission to mount an appeal within prescribed time. This new right is exercisable only within narrow strictures of discovery of new and compelling evidence.

(20) *Right to intermediary*

The Constitution also recognizes the right of an accused person as well as a complainant to communicate with the court with the aid or assistance of an intermediary where the interest of justice so requires for indeed there may be instances where certain witnesses are in positions of such vulnerability as to be unable to effectively communicate. An intermediary is a person who, on account of his or her own expertise or experience, is allowed by the court to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker.⁷⁶⁶

⁷⁶⁴ *Ibid*, art 50(2)(q).

⁷⁶⁵ *Ibid*, art 50(6).

⁷⁶⁶ See for instance, section 2 of the Sexual Offences Act No 3 of 2006.

CHAPTER TEN

JUDGMENT AND SENTENCING

10.1 JUDGMENT

10.1.1 Definition of Judgment

A judgment is the final decision of the court as pertains the guilt or otherwise of the accused person. It is entered and rendered by the court once all evidence has been adduced by both sides.

10.1.2 Delivery of Judgment

The court need not read the entire judgment and may pronounce and explain the substance only. If, however, either the prosecution or the defence requests that the whole judgment be read out by the presiding judge or magistrate, it shall be so read.⁷⁶⁷ Moreover, on the application of the accused person, a copy of the judgment, or when he so desires, a translation in his own language, if practicable, shall be given to him without delay.⁷⁶⁸

The presence of the accused person at the pronouncement of judgment is vital and he must, if in custody, be brought before the court. If he is not in custody, he will be required by the Court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of a fine only or one in which he is acquitted.⁷⁶⁹

A judgment delivered by a Court is not invalidated by reason of the absence of a party or his advocate on the day of delivery of judgment or of any omission to serve, or defect in serving of a notice of delivery of judgment on the parties or their advocates or any of them.⁷⁷⁰

10.1.3 Form of Judgement

In order to satisfy the requirements as to formal validity, every judgment must:⁷⁷¹

1. be written by or under the direction of the presiding officer of the Court
2. be in the language of the Court,

⁷⁶⁷ s 168(1) of the CPC.

⁷⁶⁸ *Ibid*, s 170.

⁷⁶⁹ *Ibid*, s 168(2).

⁷⁷⁰ *Ibid*, s 168(3).

⁷⁷¹ *Ibid*, s 169(1).

Essentials of Criminal Procedure in Kenya

3. contain the point or points for determination, the decision thereon and the reasons for the decision,
4. be dated
5. be signed by the presiding officer in open Court at the time of pronouncing it.⁷⁷²

In *Republic v Gikunju Karingu*,⁷⁷³ the Court held that the practice of adding notes to a signed judgment is not one to be encouraged; hence a judgment should contain within itself all the reasons which have acted on the magistrate's mind in coming to his conclusion, while in *Republic v Lute s/o Luzala*,⁷⁷⁴ the Court said that a judgment must be written and read at the time of its delivery.

In *Lokwacharia v Republic*,⁷⁷⁵ the judgment of the High Court appealed from was dated but not signed by one of the two judges who delivered it. The Court of Appeal held that in such a case there was actually no judgment of the superior Court. The Court said that it was therefore precluded from hearing the merits and demerits of the said judgment. That being the position, the appellant's appeal was allowed and a further order made directing that the appeal to the High Court be heard *de novo* before a different bench.

In the case of a conviction, the judgment must specify the offence of which, and the section or other law under which, the accused person is convicted, and the punishment to which he is sentenced.⁷⁷⁶

In the case of an acquittal, the judgment must state the offence of which the accused person is acquitted, and must direct that he be set at liberty.⁷⁷⁷

10.1.4 Content of Judgement⁷⁷⁸

1. The judgment should contain a brief statement of the offence with which the accused is charged. Abbreviations should not be used. The opening paragraph should contain an accurate statement of precisely what offence the accused person is alleged to have committed.
2. It should contain a summary of the evidence of the prosecution. This should be

⁷⁷² See the case of *Gichohi v Republic* [2002] 1 KLR 214.

⁷⁷³ [1943] K.L.R. 23 See also *Njoroge v Republic* [2002] 2 KLR 200.

⁷⁷⁴ 1 E.A.C.A. 106.

⁷⁷⁵ [2005] 2 KLR 379.

⁷⁷⁶ s 169(2) of the CPC.

⁷⁷⁷ *Ibid*, s 159(3).

⁷⁷⁸ Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13).

Judgment and Sentencing

- in narrative form.
3. The judgment should contain a summary of the defence case. It should be clear where the defence case differs from that of the prosecution. The magistrate must refer to the contested and uncontested elements of the charge. In *Okeithi Okale v Republic*, it was held that failure by a judge to consider the case for the defence constitutes a breach of the rules of natural justice and therefore sufficient to unsettle the judgment.⁷⁷⁹
 4. It should also contain the points of determination. Having related both sides of the case, the magistrate casts aside irrelevant considerations and goes to the crux of the matter. He must appreciate and evaluate the evidence.
 5. Having made clear exactly what has to be decided, the magistrate then makes his decision, immediately followed by the reasons therefor. He can make reference to the demeanour of a witness and the manner in which a witness gave evidence if there is anything to be deduced from this.
 6. A separate paragraph may be necessary in the judgment if there are some unusual features of evidence, procedure or criminal law that may have arisen in the course of the trial.
 7. To allay all doubts, the concluding paragraph should contain a single sentence clearly stating whether the accused is found guilty and convicted or not guilty and acquitted of the offence with which he is charged.

If the accused person is convicted, the formal expression of that decision is referred to as a conviction or order, which may if required, be afterwards drawn up and shall be signed by the court making it, or by the clerk or other officer of the court.⁷⁸⁰

10.2 CONVICTIONS FOR OFFENCES OTHER THAN THOSE CHARGED

There are instances when it is permissible, necessary even, for the court to convict an accused person for offences other than the one or those with which he was charged. In so convicting, the court is deemed to be exercising powers that are additional to and not in any way derogatory of any of the other provisions of the Criminal Procedure Code or any other law.⁷⁸¹ These include the following:

1. The person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and that combination is proved but not the remaining particulars.⁷⁸² In *Ali Mohammed*

⁷⁷⁹ [1965] EA 55.

⁷⁸⁰ s 217 of the CPC.

⁷⁸¹ *Ibid*, s 191.

⁷⁸² *Ibid*, s 179(1).

Essentials of Criminal Procedure in Kenya

- Hassani Mpanda v Republic*,⁷⁸³ it was held that the substituted offence must be both minor and cognate of the offence charged.
2. The person is charged with an offence and facts are proved which reduce it to a minor offence.⁷⁸⁴ This was reiterated in the case of *Hassan v Republic*.⁷⁸⁵
 3. When a person is charged with an offence, he may be convicted of having attempted to commit that offence.⁷⁸⁶
 4. When a woman is charged with the murder of her child who is younger than twelve months, and the court is of the opinion that she caused the death but had not fully recovered from post-partum and lactative disturbance she may be convicted of the offence of infanticide.⁷⁸⁷
 5. When a person is charged with the murder or manslaughter of a child or with infanticide, or with an offence relating to the procuring of abortion and the court is of the opinion that he is not guilty of the offence charged but of the offence of killing an unborn child.⁷⁸⁸
 6. When a person is charged with killing an unborn child and the court is of the opinion that he is not guilty of that offence but of an offence relating to the procuring of abortion.⁷⁸⁹
 7. When a person is charged with the murder or infanticide or killing an unborn child and the court is of the opinion that he is not guilty of any of those offences, and it appears in evidence that the child had recently been born and that the person endeavoured to conceal the birth of that child, he may be convicted of the offence of endeavouring to conceal the birth.⁷⁹⁰
 8. When a person is charged with manslaughter from his driving of a motor vehicle and the court is of the opinion that he is not guilty thereof, he may be convicted of an offence of causing death by driving or obstruction.⁷⁹¹
 9. Where a person is charged with an offence related to the administration of unlawful oaths to commit other offences,⁷⁹² and the court is of the opinion that he is not guilty of that offence but of a different offence under the same paragraph, he may be convicted of that other offence.⁷⁹³
 10. When a person is charged with rape and the court is of the opinion that he is not guilty thereof but that he is guilty of an offence under the Sexual Offences Act,⁷⁹⁴ he may be convicted of that other offence.⁷⁹⁵

783 [1963] E.A. 294.

784 *Ibid*, s 179(2).

785 [2005] 2 KLR 151.

786 *Supra* nt 729, s 180 See the case of Muiruri and 2 others v Republic [2002] 1 KLR 274

787 *Ibid*, s 181(1).

788 *Ibid*, s 181 (2).

789 *Ibid*, s 181(3).

790 *Ibid*, s 181(4).

791 s 46 of the Traffic Act, S 182 of the CPC.

792 under paragraph (a) of s 61 of the Penal Code (Cap 63 Laws of Kenya).

793 *Supra* nt 699, s 183 of the CPC.

794 Act No. 3 of 2006.

795 *Ibid*, s 184.

Judgment and Sentencing

11. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that other offence.⁷⁹⁶
12. When a person is charged with an offence relating to burglary, housebreaking and similar offences,⁷⁹⁷ and the court is of the opinion that he is not guilty of the particular offence but that he is guilty of a different related offence, he may be convicted of that other offence.⁷⁹⁸
13. When a person is charged with stealing anything and the facts proved amount to an offence of handling, having or conveying stolen property,⁷⁹⁹ having obtained the same by false pretences with intent to defraud, he may be convicted of the offence of obtaining by false pretences.⁸⁰⁰
14. When a person is charged with falsely obtaining property with intent to defraud and it is proved that he stole the same, he may be convicted of the offence of stealing.⁸⁰¹
15. When a person is charged with the offence of stock theft⁸⁰² and the court is of the opinion that he is not guilty thereof but that he is guilty of illegal possession of stock,⁸⁰³ he may be convicted of the latter offence.⁸⁰⁴

10.3 SENTENCING

Once the court finds that an accused person is not guilty of the offence charged, it acquits him and he is set at liberty unless otherwise lawfully held. That effectively ends his engagement with the criminal justice process. In fact, the production of a copy of the order of acquittal, certified by the clerk or other officer of the court, shall without other proof be a bar to a subsequent information or complaint for the same matter against the same accused person.⁸⁰⁵ It is the essence of the plea of *autrefois acquit*.

Where, however, a finding of guilty is arrived at and a conviction entered, the stage is set for the court to impose a penalty by passing a sentence upon the convicted offender.

796 *Ibid*, s 186.

797 mentioned in Chapter XXIX of the Penal Code (Cap 63 Laws of Kenya).

798 *Supra* nt 746, s 187 See also the case of *Buru v Republic* [2005] 2 KLR 533.

799 under s 322 and s 323 of the Penal Code.

800 *Ibid*, s 188(b).

801 *Ibid*, s 189.

802 s 278 of the Penal Code.

803 s 9 of the Stock and Produce Theft Act.

804 s 190 of the CPC.

805 *Ibid*, s 218.

10.3.1 Principles of Sentencing

In the case of *Republic v Jagani and another*,⁸⁰⁶ the High Court stated that the purpose of a sentence is usually to disapprove or denounce unlawful conduct as a means to deter the offender from committing the offence, to separate offenders from society if necessary, to assist in rehabilitation of offenders and in retribution by providing for reparation for harm done to victims in particular and generally to society. It is also seen as promoting a sense of responsibility in offenders.

In *Kennedy Indiemu Omuse v Republic*,⁸⁰⁷ the Court of Appeal held that the sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and the trial Court must first look at the facts and circumstances of the case in their entirety before settling for any given sentence.

Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass⁸⁰⁸ and in this regard the High Court has jurisdiction that is unlimited and may therefore pass any sentence that the law authorizes⁸⁰⁹ while subordinate courts pass such sentences as are conferred upon their class and seniority.⁸¹⁰

In determining the extent of a Court's jurisdiction to pass a sentence of imprisonment, the Court has jurisdiction to pass the full sentence of imprisonment provided in addition to any term of imprisonment which may be awarded in default of payment of a fine, costs or compensation.⁸¹¹

In computing time, the position previously was expressed in *Republic v Yonasani and others*⁸¹² that every sentence should run (unless otherwise provided for by the Penal Code) from the date of pronouncement which precluded any court from antedating the commencement of sentence. This changed, however, when the Criminal Procedure Code was amended⁸¹³ so that the period of time spent in custody is taken into account as part of time served.

When a person is convicted at one trial of two or more distinct offences, the

806 [2001] KLR 590.

807 Criminal Appeal 344 of 2006.

808 *Supra* nt 734., s 12.

809 *Ibid*, s 6.

810 See ss 6 and 7 of the Magistrates Courts Act.

811 *Ibid*, s 7(5).

812 [1965] EACA 9.

813 [1965] EACA 9.

Judgment and Sentencing

Court may sentence him, for those offences, to a combination of several punishments prescribed therefor. Under the Criminal Procedure Code, punishment or sentences consisting of imprisonment should run consecutively unless the Court directs that they run concurrently.⁸¹⁴ The reality, however, is the opposite and this is exemplified by the case of *Republic v Sawedi Mukasa s/o Abdullah Aligiwaisa*,⁸¹⁵ where the court held that where a person commits more than one offence at the same time and in the same transaction, the practice is, save in very exceptional circumstances, to impose concurrent sentences.

In the case of *Njokav Republic*,⁸¹⁶ the High Court stated that it lies in the discretion of the court to order whether sentences should run concurrently or consecutively. Thus where offences are committed in one transaction, as it was in this case where the accused had been charged with the offences of burglary and stealing,⁸¹⁷ the sentences ought to run concurrently even when laid in separate counts.

In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher Court.⁸¹⁸

10.3.2 The sentencing process

The process of arriving at an appropriate sentence is not a shot in the dark or a matter left to the whim and caprice of the court. Rather, the Criminal Procedure Code contemplates that before passing sentence or making an order against an accused person, the court should receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.⁸¹⁹

In *Kennedy Indiemu Omuse v Republic*,⁸²⁰ the Court of Appeal stated that the Court would not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence.

814 Magistrates Courts Act, s 14(1). See also *Kudhinda v Republic* [2002] 2 KLR 89.

815 13 EACA 97.

816 [2001] KLR 175.

817 Contrary to ss 304(2) and 279(b) of the Penal Code (Cap 63).

818 *Supra* nt 720 s 14(2).

819 s 216 of the CPC.

820 *Supra*

Essentials of Criminal Procedure in Kenya

The matters that the Court should consider in determining proper sentencing include:⁸²¹

1. Intrinsic value of the subject matter
2. Antecedents of the Accused
3. Age
4. Conduct of the Accused at trial, particularly with regard to his plea
5. Prevalence of the particular crime in society

After convicting the accused the Court will first call upon the prosecution to give a factual statement on the accused and in particular whether the accused has any previous convictions and if so the nature and date of the sentence and the date when the accused was released from prison.⁸²²

When something alleged by the prosecution is denied or disputed, the Court will make a finding on its truth by following the normal procedure for trial and where the prosecution alleges previous conviction, the Court should specifically ask the accused whether he admits or denies them.

This means, in essence, that a more rational approach to sentencing should involve a structured mini-hearing with full participation and submissions by the prosecutor and the defense. However, the prosecution should not allege or imply that the accused has committed offences for which he has not been convicted. Prejudicial statements meant to influence the Court to award severe sentences should not be allowed. Still, the wide spread practice of prosecutors doing no more than state to the court that the convict has no record of convictions and should therefore be treated as a first offender appears to be a cynical dereliction of duty in this regard.

In sentencing the accused person, a court should not take into account extraneous matters that were neither in evidence nor proved. This was held in the case of *Wanjiku v Republic*,⁸²³ where the trial magistrate had misdirected himself in stating, while sentencing the appellant, that she had acted for gain and that she had used her husband's position to smuggle goods whereas there was no evidence or any proven facts from which those inferences could be drawn.

821 Spurling, A.C. and Kennedy D.C. (1939-1946), *Digest & Guide to The Criminal Law of Kenya (Colony and Protectorate of Kenya)* (2nd Edition) Kenya By, pp104.

822 Judiciary of Kenya, *Bench Book for Magistrates in Criminal Proceedings* Nairobi, Kenya pp72

823 [1984] KLR 697.

10.4 MITIGATING CIRCUMSTANCES

The accused should then be given an opportunity to deny or qualify the information presented by the prosecutor and to state further facts in mitigation. Under Common Law, this is a right- to address the court personally- accorded to the accused especially before sentencing.⁸²⁴ Known as *allocution*, this practise is available so that the court can identify the defendant as the person adjudged guilty and so that he can be given an opportunity to plead for mercy or pardon, move for an arrest of judgment or indicate why sentence ought not to be pronounced.⁸²⁵

The facts relied upon by the accused in mitigation may be questioned by the prosecution, in which case evidence must be heard and the finding made as to disputed facts. In the absence of evidence to the contrary, the Court ought not to ignore mitigating circumstances put forward by the accused.⁸²⁶

It is not mandatory for a Court to receive such information but it is desirable to do so. This was held in the case of *Republic v Nasanairi Nsubuga*.

In *Edwin Otieno Odhiambo v Republic*,⁸²⁷ the Court of Appeal held that on matters of sentencing, if a court failed to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence were enhanced.

Although mitigating factors may require an accused to be treated leniently, they do not entitle or guarantee the accused that he or she will in fact be so treated. Courts are free to ignore mitigating circumstances when the gravity of the offence or the need for deterrence is so compelling as to outweigh the individual circumstances of the accused.⁸²⁸

10.5 VICTIM IMPACT STATEMENTS

Beyond the traditional enquiry as to the accused person's antecedents by way of conviction records supplied by the prosecution and mitigating factors as given by the accused person or his advocate, a recent and innovative feature of the pre-sentencing process was introduced in Kenya by *Criminal Law (Miscellaneous Amendments) Act No. 5 of 2003*. This brought in Victim Impact Statements in a deliberate

824 Inciardi, J.A. (2002) *Criminal Justice* (7th Edition), New York: Oxford University Press p440 .

825 *Ibid*.

826 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya pp 73.

827 Criminal Appeal 359 of 2006.

828 *Ibid*.

Essentials of Criminal Procedure in Kenya

move to acknowledge victims of crime and move them from the shadowy peripheries of the criminal justice process.

“Victim impact statement” means a statement containing particulars of –⁸²⁹

- (a) in the case of a primary victim, any personal harm suffered by the victim as a direct result of the offence; or
- (b) in the case of a family victim, the impact of the primary victim’s death on the members of the primary victim’s immediate family.

They apply in relation to an offence that is being dealt with by any Court, where the offence results in the death of or actual physical bodily harm to, any person.⁸³⁰

If it considers it appropriate to do so, a Court may receive and consider a victim impact statement, which it may acknowledge and make any comment thereon as it may consider appropriate, at any time after it convicts, but before it sentences, an offender.⁸³¹ For it to be considered, a victim impact statement must have been filed by the victim or the prosecutor or on their behalves and one filed by a family victim will be considered only if the court deems it appropriate.⁸³²

The Court may avail a victim impact statement to the prosecutor, the offender or to any other person on such conditions (which shall include conditions preventing the offender from retaining copies of the statement) as it considers appropriate.⁸³³

The giving of a victim impact statement is not mandatory⁸³⁴ and none will be received or considered by a Court if the victim or any of them to whom it relates objects to its being given to the Court⁸³⁵ but the absence of a victim impact statement does not give rise to any inference that the offence had little or no impact on a victim.⁸³⁶

A victim impact statement must be in writing and must comply with such other requirements as are prescribed by rules of Court.⁸³⁷

829 s 329A of the CPC.

830 *Ibid*, s 329B.

831 s 329C(1) of the CPC.

832 *Ibid*, s 329C(3).

833 *Ibid*, s 329C(4) .

834 *Ibid*, s 329D(1) .

835 *Ibid*, s 329D(2).

836 *Ibid*, s 329D(3) .

837 *Ibid*, s 329E(1).

If a primary victim is incapable of providing information for or objecting to a victim impact statement about the personal harm suffered by the victim, a member of his immediate family or other representative of his may, subject to rules of Court, act on his behalf for that purpose.⁸³⁸

10.6 COMMITTAL TO A HIGHER COURT FOR SENTENCING

Where a person is convicted by a subordinate court of an offence which is punishable by either that court or a subordinate court of higher class or the High Court and the court, after obtaining information as to his character and antecedents, is of the opinion that greater punishment should be inflicted than it has power to inflict, it may, instead of dealing with him itself, commit him in custody to the court of higher class or the High Court for sentence.⁸³⁹

The court of higher class or High Court shall then inquire into the circumstances of the case, and may deal with the offender in any manner in which he could be dealt with if he had been convicted by itself. If the court of higher class or the High Court passes a sentence which the court convicting him had not the power to pass, the offender may appeal against the sentence to the High Court or to the Court of Appeal (as the case may be) on sentence only but otherwise he shall have the same right of appeal in all respects as if he had been sentenced by the court which convicted him.⁸⁴⁰

10.7 MOTION IN ARREST OF JUDGMENT

The accused person may, at any time before sentence, whether on his plea of guilty or otherwise, move in arrest of judgment on the ground that the information does not, after any amendment which the Court has made and had power to make, state an offence which the Court has power to try. The Court may either hear and determine the matter during the same sitting, or adjourn the hearing thereof to a future time to be fixed for that purpose. If the Court decides in favour of the accused, he is to be discharged from that information.⁸⁴¹

If no motion in arrest of judgment is made, or if the Court decides against the accused person upon a motion, the Court may sentence the accused person at any time during the session.⁸⁴²

838 *Ibid*, s 329E (2)

839 *Ibid*, s 221(2) .

840 *Ibid*, s 221(3) of the CPC.

841 *Ibid*, s 324.

842 *Ibid*, s 325.

10.8 RESERVATION OF QUESTIONS

Any court before which a person is tried for an offence may reserve the giving of its final decision on questions raised at the trial, and its decision whenever given shall be considered as given at the time of the trial.⁸⁴³

After entering a conviction in a trial before the High Court, the judge may reserve and refer any question which has arisen in the course of the trial and which would affect the fate of that trial, to a High Court bench consisting of two or more judges⁸⁴⁴ and in the mean time the person convicted shall be remanded to prison or be admitted to bail pending decision.⁸⁴⁵

The rendering of a decision has curative effect and no judgment shall be stayed or reversed on the ground of an objection which, if stated after the information was read over to the accused person, or during the progress of the trial, might have been amended by the Court, nor for any informality in swearing the witnesses or any of them.⁸⁴⁶

10.9 FACTORS TO BE CONSIDERED BEFORE SENTENCING

Unlike in certain other jurisdictions where there are clear cut sentencing guidelines, the issue of sentence in Kenya is still highly discretionary with the result that there are sometimes scandalous variances between sentences imposed for the same offences by different magistrates and sometimes by the same magistrate.

In the case of *Republic v Malakwen Arap Kogo*,⁸⁴⁷ the High Court held that there are a number of factors which determine where in the scale of sentencing an offence lies and these matters are for the learned trial magistrate. These considerations were said to be, at least where theft was concerned:

1. Intrinsic value of the subject matter
2. Antecedents of the accused
3. Youth of the accused
4. Conduct of accused at the trial, in particular whether he pleaded guilty or not guilty
5. Prevalence of the particular crime in the neighbourhood.

843 *Ibid*, s 326.

844 *Ibid*, s 327(1).

845 *Ibid*, s 327(2).

846 *Ibid*, s 328.

847 [1933] 15 KLR 115.

And in *Ndabi v Republic*,⁸⁴⁸ the court added considerations such as:

1. The fact that the appellant pleads guilty and he has no previous conviction⁸⁴⁹
2. Period of detention before trial⁸⁵⁰

10.10 TYPES OF SENTENCES

They are not found in the Criminal Procedure Code but mostly found in Chapter VI the Penal Code (*Cap 63 Laws of Kenya*)

These are listed under section 24:

- a) Death
- b) Imprisonment
- c) Detention, under the Detention Camps Act
- d) Payment of Fines
- e) Forfeiture
- f) Payment of Compensation
- g) Furnishing security to keep peace and being of good behaviour
- h) Absolute and Conditional Discharge
- i) Community Service
- j) Any other punishment provided for by the Penal Code or any other Act

a) *Death Sentence*

It is a strange fact that despite many admirable advances in the area of human rights, Kenya retains this type of punishment in its statute books even though it has not had the stomach to actually execute anyone for over two decades. Modern thinking seems to lean overwhelmingly towards the view that the death penalty is a cruel, inhuman and unusual form of punishment.⁸⁵¹

Where any person is sentenced to death, the form of the sentence shall be to the effect only that he is to suffer death in the manner authorized by law.⁸⁵²

Sentence of death must not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years. In lieu thereof, the Court

⁸⁴⁸ [1987] KLR 304.

⁸⁴⁹ See the case of *Nilson v Republic* [1970] EA 599.

⁸⁵⁰ See the case of *Wanyoni v Republic* [1980] KLR 116.

⁸⁵¹ See, for a full and well reasoned judicial pronouncement, the South African case of *State v Makwanyane and M Mchunu* Case No. CCT/3194.

⁸⁵² s 25(1) of the Penal Code (Cap 63 Laws of Kenya).

Essentials of Criminal Procedure in Kenya

must sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.⁸⁵³

When a person has been sentenced to be detained during the President's pleasure, the presiding judge must forward to the President a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.⁸⁵⁴

The death sentence cannot also be imposed on a pregnant woman and she, too would be detained at the president's pleasure.⁸⁵⁵

b) Imprisonment

A sentence of imprisonment for any offence may be accompanied by hard labour as may be required or permitted by the law under which the offence is punishable.⁸⁵⁶

Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.⁸⁵⁷

In *Bakari and another v Republic*,⁸⁵⁸ the Court of Appeal held that where there is a heavy minimum sentence prescribed for an offence, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved.

A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment but where the law concerned provides for a minimum sentence of imprisonment; a fine shall not be substituted for imprisonment.

c) Fines

Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following apply -

(a) where no sum is expressed to which the fine may extend, the amount of the

853 *Ibid*, s 25(2).

854 *Ibid*, s 25(3).

855 *Makwanyane Case*.

856 *Supra* nt 708, s 26(1).

857 *Ibid*, s 26(2).

858 [1987] KLR 173.

Judgment and Sentencing

- fine which may be imposed is unlimited, but shall not be excessive;
- (b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the Court;

In the case of *Republic v Kwirichia s/o Kinyua*,⁸⁵⁹ the Court said that the sentence of imprisonment for non-payment of fine is not a substantive sentence but a sanction imposed by law where a fine cannot be recovered, which means that a person serving a default term of imprisonment need not serve it in full as he is amenable to be released at such time as he is able to pay the pro-rata fine.

In the case of *Republic v Kaingo s/o Kimani*,⁸⁶⁰ it was held that a Court should not attempt to increase the maximum term of imprisonment allowed by law by adding a fine and the maximum term of imprisonment in default of payment. But when a fine is inflicted with a severe term of imprisonment in default of payment, then the substantive sentence of imprisonment should ordinarily not be the maximum which can be given but should be proportionately reduced.

- (c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the Court passing sentence may, in its discretion –
- (i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also
 - (ii) issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:
The imprisonment or detention which is imposed in default of payment of a fine terminates whenever the fine is either paid or levied by process of law.⁸⁶¹

d) Forfeiture

When any person is convicted of an offence the Court may, in addition to or in lieu of any penalty which may be imposed, order the forfeiture of any property which has passed in connexion with the commission of the offence or, if the property cannot be forfeited or cannot be found, of such sum as the Court shall assess as the value of the said property. Property or sum so forfeited shall be dealt with in such manner as the Attorney-General may direct.⁸⁶²

859 [1959] KLR.22.

860 [1949] KLR 22.

861 s 28(3) of the Penal Code (Cap 63 Laws of Kenya).

862 *Ibid*, s 29(9).

Payment of any sum so ordered to be forfeited may be enforced in the same manner and subject to the same incidents as in the case of the payment of a fine.⁸⁶³

Where a person is convicted of any offence and the offence arose out of, or was committed in the course of, any trade or business, the court may, in addition to any other penalty, order the prohibition or disqualification of such person from such employment, business or trade⁸⁶⁴ and failure to comply will attract penalties.⁸⁶⁵

e) Compensation

The court has jurisdiction to address victims concerned by ordering that a person who is convicted of an offence do make compensation to any person injured by his offence. The compensation may be either in addition to or in substitution for any other punishment.⁸⁶⁶

f) Costs

Subject to the limitations imposed by the Criminal Procedure Code, a Court may order any person convicted of an offence to pay the costs of and incidental to the prosecution or any part thereof.⁸⁶⁷ Though this provision exists in unambiguous terms, courts for some unknown reason seldom, if ever, apply it.

g) Security for Keeping the Peace

A person convicted of an offence not punishable with death may, instead of, or in addition to any punishment to which he is liable, be ordered to enter into his own recognizance, with or without sureties, in such amount as the Court thinks fit, conditioned that he shall keep the peace and be of good behaviour for a time to be fixed by the Court, and may be ordered to be imprisoned until such recognizance, with sureties, if so directed, is entered into. The imprisonment for not entering into the recognizance shall not extend for a term longer than one year, and shall not, together with the fixed term of imprisonment, if any, extend for a term longer than the longest term for which he might be sentenced to be imprisoned without fine.⁸⁶⁸

⁸⁶³ *Ibid*, s 29(2).

⁸⁶⁴ s 30(1) of the Penal Code (Cap 63 Laws of Kenya).

⁸⁶⁵ *Ibid*, s 30(2).

⁸⁶⁶ *Ibid*, s 31.

⁸⁶⁷ *Ibid*, s 32.

⁸⁶⁸ *Ibid*, s 33.

Judgment and Sentencing

In *Mwagoma and 3 others v Republic*,⁸⁶⁹ the High Court reiterated the procedure to be followed before an order to keep peace and execute a bond is issued as set out under sections 43, 47, 52 and 53 of the Criminal Procedure Code. Accordingly;

- I. The first step is to examine the informant on oath.⁸⁷⁰
- II. The second step⁸⁷¹ is that, where the magistrate deems it necessary to require a person to show cause why they should not be bound over, he should make an order in writing setting out matters such as:⁸⁷²
 - a) The substance of the information received;
 - b) in the case of a restriction order the district to which the person concerned is to be restricted for a period of three years; and
 - c) In any other case where the amount of bond is to be executed, the term for which it is to be in force and the number, character and class of securities, if any, required.
- III. After this order has been made, the third step is for the magistrate to hold an inquiry into the truth of the information upon which the action has been taken.⁸⁷³
- IV. The final step is to make an order to execute a bond if upon inquiry, it is proved that it is necessary for keeping peace or maintaining good behaviour that the person should execute a bond.⁸⁷⁴

In this case, Githinji J. went on to state that it is compulsory for an inquiry to be made as nearly as the manner in conducting trials in criminal cases. He stated that it is after the inquiry has been conducted that the magistrate will come to the conclusion whether or not the information has been proved and if proved decide whether it is necessary for keeping peace that the person should be required to execute a bond.

h) Absolute and Conditional Discharge⁸⁷⁵

Where the Court is of the view, having regard to all the circumstances of the case including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that an order of probation would not be suitable, it may discharge the convict absolutely or upon the condition that he shall not commit another offence in a period not exceeding 12 months from the

869 [1990] KLR 514.

870 *Supra* nt 789, s 43(1).

871 *Ibid*, s 47.

872 *Ibid*, s 47 (a)-(c).

873 *Ibid*, s 52(1).

874 *Ibid*, s 53 (1).

875 s 35 of the Penal Code (Cap 63 Laws of Kenya).

date of the order.

The Court has to explain to the offender in a language he understands that if he commits any other offence within the specified period, he will, in addition, be sentenced for the original offence. The Court may order the offender who has been discharged to pay all or any part of the costs incidental to the prosecution and compensation.

i) Community Service

The court may make an order that a convicted offender do perform community service for offences punishable by imprisonment for not more than three years and for which probation is not an appropriate sentence.⁸⁷⁶

Community service comprises unpaid public work within a community and is popularly referred to as EMPE (Extra Mural Penal Employment)⁸⁷⁷

Public work includes but is not limited to –

- (i) construction or maintenance of public roads or roads of access;
- (ii) afforestation works;
- (iii) environmental conservation and enhancement works;
- (iv) projects for water conservation, management or distribution and supply;
- (v) maintenance work in public schools, hospitals and other public social service amenities;
- (vi) work of any nature in a foster home or orphanage;
- (vii) rendering specialist or professional services in the community and for the benefit of the community.

The nature or type of public work, in any particular case, is determined by the court after consultation with the community service orders committee.

Where a court determines that a community service order should be made, it may, before making the order, direct a community service officer to conduct an inquiry into the circumstances of the case and of the offender and report the findings to the court. An inquiry may be conducted in any such manner and the report may be in such form and cover such matters as may be prescribed.⁸⁷⁸

A court shall not make an order in respect of an offender unless the offender is

876 s 3(1) of the Community Service Orders Act Cap 10.

877 *Ibid*, s 3(2) .

878 *Ibid*, s 3(3).

Judgment and Sentencing

present and the court is satisfied that adequate arrangements exist for the execution of the order; and after considering the report made and, where necessary, after hearing the community service officer, that the offender is a suitable person to perform community service under the order.⁸⁷⁹

879 *Ibid*, s 3(5) .

CHAPTER ELEVEN

APPEALS AND REVISIONS

11.1 APPEALS

The general rule is that any person convicted of a criminal offence in a magistrate's court has a right of appeal to the High Court⁸⁸⁰ against conviction and the magistrate is required to inform him of this right.⁸⁸¹

As for sentence, it was held in *Republic v Jagani and another*,⁸⁸² that a court on appeal will only interfere with the decision of the trial court where:

- i. the sentence was imposed against legal principles, or
- ii. relevant factors were not considered or
- iii. irrelevant and or extraneous matters were considered or
- iv. the sentence is manifestly excessive in view of the circumstances of the case.

This circumspection was expressed in *Macharia v Republic*,⁸⁸³ where the Court of Appeal held that an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that if it had tried the appellant it would have passed a somewhat different sentence. It would be slow to interfere unless the trial judge acted on some wrong principle or overlooked some material facts or issued a sentence that was manifestly excessive.

An appellate court is not under any obligation to allow an appeal simply because the State is not opposed to it. It is under a duty to ensure that it subjects the entire evidence tendered before the trial court to a close, fresh and exhaustive scrutiny and reassess it to reach its own determination based on the evidence and nothing else. It has to consider all the submissions that are made before it by both the appellant and the state.⁸⁸⁴

While an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution. If, however, there is no evidence to support a particular conclusion,

880 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13).

881 *Ibid*, see s330.

882 [2001] KLR 590.

883 [2003] 2 EA 559.

884 *Odhiambo v Republic* [2005] 1 KLR 564.

or if it is shown that a trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong, the appellate court will not hesitate to interfere, as the Court of Appeal's stated in *Mwaniki v Republic*.⁸⁸⁵

11.1.1 Appeals from Subordinate Courts

An appeal lies from the magistrate's court to the High Court on matters of fact as well as of law.⁸⁸⁶

The High Court, as the first appellate Court is entitled and indeed duty bound to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial Court should be upheld.⁸⁸⁷

The Court of Appeal in *Amolo v Republic*⁸⁸⁸ stated that an appellate court is not entitled to alter the sentence on appeal unless convinced that the trial court erred in principle in imposing it, except where the sentence was so manifestly harsh or excessive as to be evidence that the trial court erred.

The first appellate court's duties in criminal cases were laid down by the Court of Appeal in *Kinyanjui v Republic*,⁸⁸⁹ thus:

- a. it is mandatory to look at the evidence before the trial magistrate afresh, re-evaluate and re-examine the same and reach its own independent conclusion whether or not to uphold the conviction of the appellant. In reaching its decisions, the High Court has to bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not be expected to make any findings as to the demeanour of the said witnesses.⁸⁹⁰
- b. the High Court is mandated to consider the grounds of appeal put forward by the appellant in reaching its judgment.⁸⁹¹

In the case of *Patrick and another v Republic*,⁸⁹² the Court said that it is not the function of the appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. An appellant on first appeal is, therefore, entitled to expect the evidence as a whole to be submitted to a fresh

885 [2001] KLR 161.

886 *Supra* nt 830, s 347(1).

887 *Okeno v Republic* [1972] EA 32, see also *Pandya v Republic* [1957] EA 570.

888 [1991] KLR 392.

889 [2004] 2 KLR 364.

890 *Ganriel Kamau Njoroge v Republic* [1982-88] 1 KAR 1134 see also *Okeno v Republic* [1972] EA 32.

891 *Pandya v Republic* [1957] EA 33, *Okeno v Republic* [1972] EA 32 and *Njoroge v Republic* [1987] KLR 19.

892 *Supra*.

and exhaustive examination and to the appellate Court's own decision on the evidence.

Nonetheless, in *Omusa v Republic*,⁸⁹³ the Court of Appeal clarified that even where the High Court does not subject the evidence before the subordinate court to fresh scrutiny and thus errs, an appeal on that point may be dismissed if it considers that no substantial miscarriage of justice has in fact occurred.

In *Buru v Republic*,⁸⁹⁴ the High Court held that the trial court has a greater advantage than an appellate Court in assessing the credibility of witnesses. A first appellate court would not normally interfere with the findings of a lower court based on credibility of witnesses unless it is shown that no reasonable tribunal could make such findings or that the trial Court had erred in law in making the findings.⁸⁹⁵

Viscount Salmon is on record as succinctly laying down the circumstances in which an appellate Court may be justified in taking a different view of facts from that of a trial judge. In *Watt v Thomas*,⁸⁹⁶ he stated that an appellate Court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (where this is a question of law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially after that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and the view of the trial judge as to where credibility lies is entitled to great weight. The judge of the first instance may have gone wrong on a question of fact; but it is a cogent circumstance that a judge of the first instance, when estimating the value of a valid testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given.

11.1.2 Number of Judges on Appeal

Appeals from subordinate Courts are heard by two judges of the High Court, except when in any particular case the Chief Justice, or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by

⁸⁹³ [2003]1 KLR 230.

⁸⁹⁴ [2005] 2 KLR 533.

⁸⁹⁵ See also *Republic v Oyier* [1985] KLR 353.

⁸⁹⁶ [1947] A.C 484.

one judge.⁸⁹⁷

If on the hearing of an appeal the Court is equally divided, the appeal is reheard before three judges.⁸⁹⁸ In the case of *Nzingo v Republic*⁸⁹⁹ the Court of Appeal nullified the conviction of an applicant, whose first appeal had been heard by one Commissioner of Assize. There was no evidence on the face of the record to show that the Chief Justice had directed the appeal to be so heard and the single judge, therefore, did not have jurisdiction.

11.1.3 Time of Appeal

An appeal is entered within fourteen days of the date of the order or sentence appealed against⁹⁰⁰ unless the court to which the appeal is made for good cause admits the appeal out of time if satisfied that the delay was caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the Court therefor.⁹⁰¹

11.1.4 Petition of Appeal

An appeal is made in the form of a written petition signed by the appellant or his advocate and must be accompanied by a copy of the judgment or order appealed from.⁹⁰² It must be signed by the appellant if he is unrepresented or by his advocate. It must contain the matters of law or fact the trial court is alleged to have erred in. It must indicate the appellant's address of service.⁹⁰³

An appellant may not rely on a ground not in his petition⁹⁰⁴ but the petition may be amended without leave by giving notice to the Registrar of the High Court and to the Attorney General within seven days of receipt of the record of proceedings provided the petition had been filed within the prescribed fourteen days. Amendments under any other circumstances must be with leave of the High Court, which may impose conditions such as costs. The application is made by motion in open court at or before the hearing of the appeal.

897 *Ibid*, s 359(1).

898 *Ibid*, s 359(2).

899 [2004] 2 KLR 1.

900 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No 13).

901 *Supra* nt 849, s 349 of the CPC.

902 *Ibid*, s 351.

903 *Ibid*, s 352.

904 *Ibid*.

Appeals and Revisions

If the appellant is in prison, he may present his petition of appeal and the accompanying documents to the Officer in Charge of the Prison, who will forward them to the Registrar of the High Court.⁹⁰⁵

11.1.5 Summary disposal of Appeals

When the High Court has received the petition and copy of record, a judge will peruse them and if he considers that there is no sufficient ground for interfering, may reject the appeal summarily and certify that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint.⁹⁰⁶

As this is a most draconian power, no appeal should be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of it; except where it is brought on the ground that the conviction is against the weight of the evidence or the sentence is excessive and it appears to a judge that the evidence is sufficient to support the conviction and there is nothing in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced.⁹⁰⁷ In these circumstances the appeal may, without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record

In the case of *Ndungu v Republic*,⁹⁰⁸ the Court said that summary rejection of appeals under section 352(2) of the Criminal Procedure Code applies only where an appeal is on the grounds that conviction is against the weight of the evidence or that the sentence is excessive.⁹⁰⁹ Summary rejection of appeals was meant for trivial cases where the evidence was overwhelmingly clear on record to support the conviction and where the appeals were based on evidence alone. The section should be sparingly used and only in obvious, clear and straight forward cases which do not raise a point of law. Where questions of law are raised in the petition of appeal there is no jurisdiction to reject it summarily.⁹¹⁰

Whenever an appeal is summarily rejected notice of rejection must be given to the Attorney-General and to the appellant or his advocate.⁹¹¹

905 s 351 of the CPC.

906 *Supra* nt 387, s 352(2) See also *Okello v Republic* [2003] KLR 205.

907 *Ibid*, s 352(1). See also *Momanyi v Republic* [2003] 1 EA 197.

908 [2003] 1 EA 197.

909 See also *Momanyi v Republic* [2004] 2 KLR 197.

910 See also the case of *Okang v Republic* [1982-1988] 1KAR 276 and *Muthara v Republic* [1999] LLR 973(CAK).

911 *Supra* nt 390, s 352(3).

Where an appeal against conviction has been lodged and a judge of the High Court is satisfied that the conviction cannot be supported, and the Attorney-General has informed the Court in writing that he does not support the conviction, the judge may summarily allow the appeal.⁹¹²

If an appeal is not dismissed summarily, the High Court will issue notice to the parties thereto of the time and place at which it will be heard and will furnish the respondent with a copy of the proceedings and of the grounds of appeal.⁹¹³

11.1.6 Powers of the High Court

At the hearing of the appeal the appellant first addresses the Court in support of the grounds set out in the petition of appeal and the respondent then gives his response.⁹¹⁴ The Court may thereafter invite the appellant to reply upon any matters of law or fact raised by the respondent in his address.⁹¹⁵

An appellant is entitled as of right, even when in custody, to be present, if he so wishes, at the hearing of the appeal except, by some curious statutory qualification, where the same involves a question of law solely, in which case he requires the leave of the Court.⁹¹⁶

Although the statute provides that an appellant in custody pays all expenses incidental to his transfer to and from the place where the court sits to hear the appeal, the practice is more in keeping with the proviso that his presence is advisable for the due determination of the appeal and so the expenses are defrayed out of moneys provided by Parliament.⁹¹⁷

The Court may then make any of the following orders:⁹¹⁸

- (a) Dismiss the appeal where it finds no sufficient ground for interfering
- (b) In an appeal from a *conviction* –
 - i) reverse the finding, and set aside the sentence, acquitting or discharging or ordering the retrial of the accused
 - ii) alter the finding but maintain the sentence or with or without altering the finding, reduce or increase the sentence; or

912 CPC, s 352(A).

913 *Ibid*, s 353.

914 *Ibid*, s 354(1).

915 *Ibid*, s 354(2).

916 *Ibid*, s 354(4).

917 *Ibid*, s 354(5).

918 *Ibid*, s 354(3).

Appeals and Revisions

- iii) alter the nature of the sentence;
- (c) in an appeal against *sentence*, increase, reduce it or alter its the nature
- (d) in an appeal from an *acquittal*, an order refusing to admit a complaint or refusing or dismissing a charge; reverse, affirm or vary the determination of the subordinate court, or remit the matter with its opinion thereon to guide the subordinate court in determining it whether by way of re-hearing or otherwise.
- (e) in an appeal from *any other order*, alter or reverse it.

In a residual sense and in all cases, the High Court is empowered to make any amendment or any consequential, incidental or other order that commends itself to it as just and proper but may not impose a greater sentence than might have been imposed by the trial court.⁹¹⁹

It is note worthy that whatever powers the High Court exercises after hearing an appeal, they do not include the conversion of an acquittal into a conviction except in the expressly provided and rare situations where the Attorney General appeals against such acquittal. The case of *Mwangi v Republic*,⁹²⁰ demonstrates this point. There, the accused was found guilty of the alternative charge of handling stolen property but acquitted of the main charge of robbery with violence. On appeal, the High Court dismissed his appeal, set aside the conviction on the alternative charge and substituted a conviction on the main charge then sentenced him to death. In his second appeal, the Court of Appeal held that since there was no appeal by the Attorney General against the acquittal of the applicant, then from section 354(3) (a) and (b) of the Criminal Procedure Code, the High Court had no jurisdiction, when dealing with the appeal against conviction for the handling, to alter the acquittal.

Upon deciding the appeal, the High Court certifies its judgment or order to the court appealed from, which must then make orders and, if necessary, amend the records in conformity with the said judgment or order.⁹²¹

11.1.7 Power to take further evidence

In dealing with an appeal, the High Court may, if it deems it necessary for reasons to be recorded, itself take or direct a subordinate court to take and certify to itself any additional evidence,⁹²² to be deemed as having been taken by the trial court⁹²³.

919 s 354(6) of the CPC.

920 [2005] KLR 375.

921 *Ibid*, s 355(1).

922 *Ibid*, s 385(1).

923 *Ibid*, s 385(4).

before proceeding to dispose of the appeal.⁹²⁴ In order to avoid any actual or perceived prejudice, the accused must be present when the additional evidence is taken unless the High Court otherwise directs.⁹²⁵

The basis and rationale for allowing additional evidence in an appellate court was held in the case of *John Hasakwa s/o Martin v Republic*,⁹²⁶ as introducing evidence that was not available at the trial or the relevance of which could not then be reasonably appreciated.

11.2 RETRIAL

Once an appeal has been decided, and the appellate court comes to the conclusion that the accused person has not had a satisfactory trial,⁹²⁷ or that his conviction is vitiated by some irregularity, it may order a retrial.

Whether a retrial should be ordered or not depends on the circumstances of the case⁹²⁸ and many judgments show that this is a decision that gives appellate judges a measure of anxiety. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant.⁹²⁹ It will not be ordered for the purposes of enabling the prosecution to have a second bite at the cake by filling up gaps in its evidence at the first trial.⁹³⁰

The principles that should guide the Court on whether or not to order a retrial in a criminal appeal were summarized in the case of *Koome v Republic*,⁹³¹ as follows:

1. In general a retrial will be ordered when the original trial was illegal or defective;
2. A retrial will not be ordered where the conviction is set aside because of insufficiency of evidence⁹³² or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;
3. Even where a conviction is vitiated by mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;

924 *Ibid*, s 385(2).

925 *Ibid*, s 385(3).

926 E.A.C.A. Cr. App No 132 of 1954.

927 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13) pp 134 See also *Ouma Ombenjo and another v Republic* [2004] eKLR (Criminal Appeal 1017 of 2002).

928 *Muinuri v Republic* [2003] KLR 552.

929 *Ibid*,

930 See also *Muraya v Republic* [2001] KLR 50.

931 [2005] 1 KLR 575.

932 See also the case of *Makepe v Republic* [1989] KLR 523.

Appeals and Revisions

4. Each case must depend on its particular facts and circumstances;⁹³³
5. An order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.

In *Sinaraha v Republic*,⁹³⁴ the High Court added the further and important factor that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. In terms of propriety and exactitude, the proper order to make before directing a retrial is not to quash but set aside the conviction since the merits of the conviction have not been gone into. This was the holding in *Otieno and another v Republic*.⁹³⁵

Where a retrial is ordered, the onus is on the prosecution to commence and finalise the subsequent trial without delay as was stated in *Republic thro' Machakos Police Station v Nzioki and another*.⁹³⁶

11.2.1 Abatement of Appeals

Every appeal that is yet to be determined abates or dies a natural death when the appellant dies.⁹³⁷ The exception to this is an appeal from a sentence of a fine, which can still be continued for the benefit of the appellant's estate, notwithstanding his demise.

Once it is brought to the attention of the court that the appellant has expired, the proper cause of action is to rule that his appeal has abated. It is irregular for the Court to strike out the appeal as its competence does not fall for consideration. This was made clear by the E.A. Court of Appeal in *Semande v Uganda*.⁹³⁸

11.2.2 Second Appeals

A decision of the High Court on appeal may be appealed against to the Court of Appeal on a matter of law.⁹³⁹ No such appeal shall be entertained on a matter of fact, severity of sentence being one such.⁹⁴⁰ Sentence can be a subject of a second

933 See also the case of *Kiokoi, Alfred Mumo v Republic* Criminal Appeal No 251 of 2001.

934 [2004] 2 KLR 328.

935 [1991] eKLR (Criminal Appeal No 55 of 1989).

936 [2003] KLR 459.

937 s 360 of the CPC, see also sec 68(1) of the Court of Appeal Rs and the case of *Mwangi and another v Republic* [2004] 2KLR 803.

938 [1999] 1 EA 321.

939 *Supra* nt 343, s 361(1).

940 *Ibid*, s 361(1)(a).

Essentials of Criminal Procedure in Kenya

appeal only where it was enhanced by the High Court or where the trial court lacked power to pass it.

On hearing the appeal, the Court of Appeal may set aside or vary the judgment of the courts below for being erroneous in law and may make any order that the said courts could have made. Alternatively it may remit the case together with its decision on it to either court with the appropriate directions.⁹⁴¹

Where the Court of Appeal finds that a party before it had been properly convicted by the trial court, it may either affirm the sentence passed by that court or the first appellate court or substitute for it some other sentence, whether more or less severe as it may think proper.⁹⁴²

Where the Court of Appeal is satisfied that an appellant who was convicted by the trial court of a certain offence could on the finding of the trial court and the High Court have been lawfully convicted of a different offence, it may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the courts below a conviction on that other offence and pass sentence accordingly.⁹⁴³

Even where the Court of Appeal forms the opinion that an appeal could be decided in favour of the appellant, it may nonetheless leave the decisions of the courts below undisturbed and dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred.⁹⁴⁴

Once a second appeal has been filed, the High Court may admit the appellant to bail.⁹⁴⁵

An order of the High Court made on a revision or a case stated shall be deemed to be a decision on appeal and an appeal therefrom a second appeal⁹⁴⁶ but a refusal by the High Court to extend time for filing an appeal shall not be appealable.⁹⁴⁷

The principle that a second appellate court will confine itself only to matters of law with the concomitant hesitancy to disturb decisions of the courts below comprising concurrent findings of fact has its basis on the need for certainty and certitude and is meant to contribute to the ending of litigation.

941 *Ibid*, s 361(2).

942 *Ibid*, s 361(3).

943 *Ibid*, s 361(4).

944 *Ibid*, s 361(5).

945 *Ibid*, s 361(6).

946 *Ibid*, s 361(7).

947 *Ibid*, s 361(8).

Appeals and Revisions

The old case of *Ganzi and 2 others v Republic*⁹⁴⁸ stated the position that obtains to date that the Court of Appeal cannot interfere with concurrent findings of fact by the trial Court and the High Court unless they were arrived at as a result of misdirection or non direction of such a nature that, without them, it is reasonably possible that the appellant could not have been convicted:⁹⁴⁹

However, in *Daniel Kabiru Thiong'o v Republic*,⁹⁵⁰ the Court of Appeal held that an invitation to depart from concurrent findings of fact by the trial and first appellate courts should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing otherwise. The only compelling reason (s) would be that no reasonable tribunal could, on evidence adduced, have arrived at such findings, or in other words, the findings were perverse and therefore bad in law, such as if they are shown to be based on no evidence.⁹⁵¹

And in *Stephen Muriungi and another v Republic*,⁹⁵² Chesoni, Ag JA (as he then was) stated:

...where a right of appeal is conferred to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision as bad in law.⁹⁵³

11.2.3 Bail pending Appeal

The trial court has discretion to grant bail pending appeal, the general rule being that the same should only be granted in exceptional circumstances for the reason that the appellant is at this point the subject of a valid conviction imposed by a competent court and is therefore devoid of the presumption of innocence, which is foundational to pre-trial bail.

Whereas the grounds and considerations for the said grant of bail pending appeal have been treated of at length in Chapter Eight, it is enough to say that

948 [1936-1951] 6 ULR 161. See also *Kimemia and another v Republic* [2004] 2 KLR 46, *Kiringo v Republic* [1982] KLR 213 and *Nguku v Republic* [2004] 2 KLR 5.

949 [2005] 1 KLR see also *Mwita v Republic* [2004] 2 KLR 60.

950 (unreported) See the case of *Mwita v Republic* [2004] 2 LR 65.

951 See *Gachuru v Republic* [2005] KLR, *Patrick and another v Republic* [2005] 2 KLR and *Thiong'o v Republic* [2004] 2 KLR 38.

952 [1982-1988] 1 KAR 60.

953 *Mwita v Republic* (Supra).

the sentiments of Edwards C.J. in the Ugandan case of *[1982-1988] 1 KAR 60*,⁹⁵⁴ are germane

In my view it may be a hardship for a person sentenced to a short term of imprisonment were refused release on bail pending the determination of his appeal because, in the event of his appeal succeeding, he might have served a substantial part of his sentence. I do not wish to lay down any hard and fast principles . . . Each case must depend upon its own circumstances. An important matter will be the position of the Applicant, whether he has a permanent place of residence in Uganda and whether he is the sort of person likely to attend . . . his appeal.

Before considering an application for bail pending appeal, the magistrate should ensure that the accused person has in fact lodged an appeal.⁹⁵⁵ In *Anand v Republic*,⁹⁵⁶ the magistrate released the appellant on bail before the appeal was lodged, which was held to be irregular. It is the existence of an appeal, or at any rate a formal notification of the same, that invests the trial court with jurisdiction to consider a bail application.

Where the appellant is convicted of an offence that is itself unbailable such as murder, he cannot be granted bail under any circumstances.⁹⁵⁷

11.2.4 Appeals from the High Court

A person convicted on a trial held by the High Court may appeal to the Court of Appeal as of right against conviction where he has been sentenced to death, or to imprisonment for longer than twelve months, or to a fine exceeding (the now extremely small sum) two thousand shillings.⁹⁵⁸ An appeal against sentence can only be with leave of the Court of Appeal unless the sentence is one fixed by law.⁹⁵⁹

As this is a first appeal, it may be mounted on grounds of law or of fact or of mixed law and fact.⁹⁶⁰ The question of whether or not a person was properly identified as the perpetrator of a crime is an example of mixed law and fact.

A person convicted by the High Court and sentenced to a term of imprisonment or a fine that is lower than the set threshold may nonetheless appeal to the Court

954 [1969] EA 14.

955 Criminal Procedure in Uganda and Kenya, Law in Africa No. 13 pp 132.

956 [1952]20(2) K.L.R. 119.

957 *Akuti v Republic* [1991] KLR 338.

958 *Supra* nt 896, s 379(1).

959 *Ibid*, s 379(b).

960 *Ibid*, s 379(a).

Appeals and Revisions

of Appeal with its leave or with a certificate of the trial judge that his case involves a question of law of great general or public importance sufficient to warrant an appeal.⁹⁶¹

No appeal is allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by the High Court, except as to the extent or legality of his sentence.⁹⁶²

In a proper case, except where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, once a notice of appeal is filed, where an appeal to the Court of Appeal has been lodged, grant bail pending the hearing and determination of the appeal,⁹⁶³ where there are exceptional and unusual reasons appearing in the case,⁹⁶⁴ as already stated.

An acquittal is a benefit attaching to an accused person that cannot be reversed by way of appeal. However, the Attorney General may, within a month of such acquittal or such other time as the Court of Appeal may extend, sign and file a certificate with the Registrar of the Court of Appeal to the effect that the case involved a point of law of exceptional public importance requiring the Court of Appeal's determination thereon in the public interest. In such a scenario, the Court of Appeal will review the case and deliver a judgment thereon,⁹⁶⁵ which will be merely declaratory as the acquittal cannot be interfered with or reversed, but is binding upon all Courts subordinate to the Court of Appeal in the same manner as an ordinary judgment of that Court.⁹⁶⁶

Likewise, the Attorney-General may certify that a sentence passed by the High Court in the exercise of its original jurisdiction should be reviewed by the Court of Appeal. As such an order affects the rights of the accused, the Court of Appeal will first give him an opportunity of being heard, before deciding and it may enhance or maintain the sentence consistent with the ends of justice.⁹⁶⁷

11.3 REVISION

Apart from appeals which are predicated upon the existence of a conviction, an acquittal or some other order disposing of a matter before a subordinate court with finality, there is a different avenue by which the High Court may review cases before the subordinate court whether or not concluded, namely *revision*.

961 *Ibid*, s 379(2).

962 *Ibid*, s 379(3).

963 *Ibid*, s 379(4).

964 *Republic v Maganbhai Patel* 16 KLR 123.

965 *Ibid*, s 379(5).

966 *Ibid*, s 379(6).

967 *Ibid*, s 379(5A).

In exercising its revision jurisdiction, the High Court calls for and examines the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any such proceedings,⁹⁶⁸ where there exists sufficient circumstances entitling it to vary the order of the court below.⁹⁶⁹

A subordinate court of the first class has similar powers to call for and examine records of courts inferior to itself. Once satisfied that the latter court made a finding, sentence or order that was illegal or improper or conducted irregular proceedings, it shall make its remarks thereon and forward the said record to the High Court.⁹⁷⁰

11.3.1 Powers of the High Court in Revision

The High Court gets seized of a revision matter when reported to it by a subordinate court of the first class or moved by any party or suo motu once such matter comes to its knowledge by whatever means and it may, in the case of a conviction, exercise all the powers it possesses as a Court on appeal and may enhance the sentence imposed.⁹⁷¹ It has power to alter or reverse any impugned order except for an order of acquittal.

In keeping with the basic notions of natural justice and the constitutional guarantee of fair hearing, no order shall be made to the prejudice of an accused person unless he has had an opportunity of being heard in his own defence. This does not apply to a situation where the High Court simply passes a sentence which the subordinate court was required to pass under the written law creating the offence concerned but had failed to do so.⁹⁷² Such sentence shall, in any event, not exceed what the trial court can in law inflict.⁹⁷³

The High Court is not authorized to convert a finding of acquittal into one of conviction.⁹⁷⁴ In the case of *Bichange v Republic*,⁹⁷⁵ the Court of Appeal elaborated the meaning of this section and set aside the order of the High Court that reversed

968 s 362 of the CPC.

969 *Republic v Jagani and another (Supra)*.

970 *Supra* nt 374, s 363.

971 See *Republic v Jagani and another (Supra)*.

972 s 364(2) of the CPC.

973 *Ibid*, s 364(3).

974 *Ibid*, s 364(4) .

975 [2005] 2 KLR 4.

Appeals and Revisions

the trial magistrate's acquittal of the appellant on the main charge of defilement turning it into a conviction.

No application for revision shall be entertained at the instance or insistence of a party who has a right of appeal from a finding, sentence or order but fails or neglects to exercise that right,⁹⁷⁶ as this is a unique corrective jurisdiction and not a fall-back position for the aid of indolent would-be appellants,⁹⁷⁷ and it definitely is not meant to address or correct findings of fact by the lower court.⁹⁷⁸

Except for an accused person likely to be the subject of a prejudicial order, the High Court exercises its revisionary powers summarily unless, at its discretion, it thinks it fit to hear the parties.⁹⁷⁹

11.3.2 Number of Judges in Revision

The High Court's revisional jurisdiction is exercised by a single judge but should it be composed of more than one judge and the Court is a deadlock of opinion, the sentence or order of the subordinate court will remain undisturbed.⁹⁸⁰

11.3.3 High Court order to be certified to lower Court

Once the High Court reverses a case, its decision would be certified to the subordinate court in question, which will proceed to make such orders and correct or amend its record in conformity with the said decision.

When a case is revised by the High Court it must certify its decision or order to the Court by which the sentence or order so revised was recorded or passed. The court to which the decision or order is so certified then makes such orders as are conformable to the decision so certified, and, if necessary, the record must be amended in accordance.⁹⁸¹

The High Court's decision on revision is final and no appeal lies therefrom.⁹⁸²

976 *Ibid*, s 364(5).

977 *Walome v Republic* [1981] KLR 497.

978 *Republic v Mohammed* [1990] KLR 569.

979 *Ibid*, s 365 See *Kariuki and others v Republic* [1991] KLR 425.

980 s 366 of the CPC.

981 *Ibid*, section 367.

982 see the case of *Republic v Njoroge s/o Muroga* [1947] EACA 67.

11.4 THE FAILURE OF JUSTICE TEST

In view of the extremely detailed provisions with regard to the criminal process, it is foreseeable, indeed inevitable, that a strictly legalistic approach would find lots of errors, omissions and irregularities. To permit all such errors, omissions and irregularities of place and manner to vitiate the decisions and proceedings of courts would clearly lead to an untenable and absurd situation and for this reason the Criminal Procedure Code delineates reversible errors in the following terms:

380. "No finding, sentence or order of a criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong area, unless it appears that the error has occasioned a failure of justice."
382. "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order. Judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. . . "

Thus, unless the conducting of proceedings in the wrong place or the error, omission or irregularity in the process and proceedings is shown to have prejudiced the party complaining in some material way, the court exercising appellate or revisionary powers will be slow to interfere and these provisions, therefore, are the necessary fall back whenever there is need, in the interest of a wider, more inclusive justice, to uphold such proceedings and decisions.

Further, in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. The rationale for this is that if a party, especially if he is represented by an advocate, fails to raise objection and participates in proceedings notwithstanding some irregularity of form, content or place, he will have acquiesced in the same and cannot be heard to complain way too late in the day.

CHAPTER TWELVE

INQUESTS

Whenever there is a sudden and unexplained death and where a person is missing under circumstances leading to the belief that he may be dead, it is a requirement of the law that an inquiry be especially conducted to determine the said question and the same is called an *inquest*.

A person is under obligation to immediately inform the nearest administrative or police officer upon becoming aware of a death or discovers a body under circumstances suggestive that the deceased:

- (a) has committed suicide; or
- (b) has been killed by another or by an accident; or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or
- (d) is missing and believed to be dead;

The officer in charge of a police station or any other officer specially empowered by the Minister in that behalf must immediately inform a magistrate empowered to hold inquests, when he receives that information.⁹⁸³ He shall then proceed to the place where the body of the deceased person is, investigate, draw up and send a report on the apparent cause of death to the magistrate. In it he shall describe such marks of injury as may be found on the body; and state in what manner, or by what weapon or instrument (if any), the marks appear to have been inflicted.

In the case of a person missing and believed to be dead, the officer immediately sends to the Attorney-General, through the Commissioner of Police, as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place.⁹⁸⁴

In order to determine the cause of death with a degree of precision, the officer shall forward the body to the nearest medical officer for examination.⁹⁸⁵

Upon receiving information about the death and the investigation report thereon, the magistrate may, at his discretion, hold an inquiry to determine the cause of death.

983 s 386(1) of the CPC.

984 *Ibid.*

985 s 386(2) of the CPC.

Essentials of Criminal Procedure in Kenya

In a measure that is partly intended to foster accountability and meet the ever present danger of cover-up and impunity associated with extrajudicial killings and the untenability of the police investigating themselves where they are the primary suspects, it is mandatory for an inquest to be held where a person dies in the following circumstances: –⁹⁸⁶

1. while in the custody of police, or
2. while in the custody of a prison officer, or
3. while in a prison or
4. in the case of a missing person believed to be dead

When a magistrate holds an inquest, his investigation is either instead of or in addition to any investigation held by the police or prison officer and he exercises all powers in conducting it which he would have in holding an inquiry into an offence.

Should the magistrate consider it expedient to examine the dead body of a person already interred so as to discover the cause of death, he may cause the same to be disinterred or exhumed for the purpose.⁹⁸⁷

If before or at the termination of the inquiry the magistrate forms the opinion that some known person(s) committed an offence, he issues summons or warrant of arrest or takes such other steps as may be necessary to secure attendance to answer the charge whereupon the magistrate commences the inquiry *de novo* by way of a trial.⁹⁸⁸

If, on the other hand, the magistrate, at the termination of the inquiry is of the opinion that an offence has been committed by some person(s) unknown, he records his opinion and sends a copy to the Attorney-General.

Should his opinion be that no offence has been committed, he shall so record and close the inquiry.⁹⁸⁹

In the case of an inquiry relating to a missing person believed to be dead the magistrate must, at the termination of the inquiry, report the case together with his findings to the Attorney-General and make recommendations as to whether or not the period regarding the presumption of death should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.⁹⁹⁰ At the expiry of that lesser period, the Registrar General

⁹⁸⁶ *Ibid*, s 387(1).

⁹⁸⁷ *Ibid*, s 387(2).

⁹⁸⁸ *Ibid*, s 387(3).

⁹⁸⁹ *Ibid*, s 387 (4)&(5).

⁹⁹⁰ s 387(6) of the CPC.

Inquests

shall, on the production to him of a court certified copy of the magistrate's order, issue an appropriate certificate of death.⁹⁹¹

The Attorney-General may at any time direct a magistrate to hold an inquest into the cause of a particular death and in the case of a missing person believed to be dead give such directions as he deems fit.⁹⁹² The jurisdiction for the conduct of inquests resides in a magistrate of the first or second class, especially empowered in that behalf by the Chief Justice. The Attorney General cannot, therefore, direct or appoint a judge of the High Court to conduct an inquest as conceived of in the Criminal Procedure Code and it matters not the standing of the person dead or of the circumstances surrounding such death as was stated in the case of *George Gitau Gathimba v Bishop Muge and another*.⁹⁹³

When an inquiry has been terminated and it appears to the Attorney-General that further investigation is necessary, he may direct the magistrate to reopen the inquiry and to make further investigation including by having the body disinterred for examination. This does not apply to an inquiry at which a magistrate has recorded his opinion that the offence of murder or manslaughter has been committed by a person.⁹⁹⁴

Upon receiving a report, the Attorney-General, after considering the recommendations of the magistrate directing to make an order as to the period which should be recorded before the death is presumed, and upon the expiration of this period, the Registrar-General shall be empowered on the production to him by the proper officer entitled to apply for and receive a grant of representation of a Court certified copy of the magistrate's order, to issue to that person an appropriate certificate of death.

991 *Ibid*, s 388(4) The said certificate is issued in accordance with the Births and Deaths Registration Act, Cap 149 Laws of Kenya.

992 *Ibid*, s 388(1).

993 WC 20/07.

994 *Ibid*, s 387(2).

CHAPTER THIRTEEN

HABEAS CORPUS

Since it is in the nature of the interaction between law enforcement agencies and persons suspected of having committed crimes for the former to employ all manner of means and methods that end up curtailing the personal liberty rights of citizens, criminal procedural law has provided a means by which the High Court intervenes, in proper cases, to enforce fealty and accountability to law by requiring that such citizens be set at liberty or be availed in court. It does so by issuing directions in the nature of *habeas corpus*, which literally means produce the body.

It is a special jurisdiction given to the High Court to enquire into the circumstances under which a subject is detained and to ensure his immediate release if his detention is found to be unlawful or unjustifiable. It has also been expressed as a supervisory jurisdiction given to the High Court to supervise and control the acts of the state in any matter involving the liberty of the subject.⁹⁹⁵

The directions that the High Court may issue under the *habeas corpus* jurisdiction include the following:⁹⁹⁶

- (a) that any person within Kenya be brought up before the court to be dealt with according to law;
- (b) that any person illegally or improperly detained in public or private custody within Kenya be set at liberty;
- (c) that any prisoner detained in a prison within Kenya be brought before it to be examined as a witness;
- (d) that any prisoner so detained be brought before a court martial or commissioners appointed by the President for trial to be examined
- (e) that any prisoner within Kenya be removed from one custody to another trial; and
- (f) that the body of a defendant within Kenya be brought in on a return of *cepi corpus* to a writ of attachment.

The Chief Justice promulgated the *Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules*,⁹⁹⁷ which provides that an application shall in the first instance be made to a judge in chambers ex parte. The evidence in support is by way of affidavit, which in practice is usually sworn by a relative of the person detained. If the judge does not summarily dismiss the application, he will direct that summons be issued to the person alleged to be detaining the prisoner to come and show cause

995 See the case of *Grace Stuart Ibingira v Uganda* [1966]E.A. 45.

996 s 389(1) of the CPC.

997 Legal Notice No. 474 of 1963 made pursuant to s 389(2).

Essentials of Criminal Procedure in Kenya

why the latter should not be released forthwith. The summons are accompanied by a copy of the supporting affidavit(s) and will be served on the Attorney General if the person is in public custody and in the mean-time may admit the person detained to bail.

A judge may, in addition to any other order that he may make under these Rules, order the body of any person alleged to be improperly detained to be produced before him in Court.

So effective is the instrument of *habeas corpus* that in a majority of cases authorities that have unfairly or unlawfully detained a person, usually by holding him *in communicado* for longer than the twenty four hour⁹⁹⁸ or former fourteen-day limit, will either move to regularize the detention by preferring charges in an appropriate court or releasing him outright by the time the application comes up for *inter partes* hearing.

Still, there have been a fair number of cases where the High Court has had to pronounce on this subject as habeas corpus is not granted as a matter of course. The applicant must show cause and demonstrate that other ordinary remedies are either inapplicable or inadequate. So where cause is not shown or where there is an alternative remedy by which the validity of the detention can be challenged, the order will not be issued, as was held in *Paul Mburu Kamau and another v Provincial Criminal Investigation Officer Coast Province and another*.⁹⁹⁹

In the case of *Mohamed v Republic*,¹⁰⁰⁰ the court said that the purpose of the writ of habeas corpus is to require that a person who claims that he is unlawfully detained should be produced before the Court so as to test the validity of his detention. Should the Court hold that he is being unlawfully detained, it will ensure the release of that person. Furthermore, it is trite law that a writ of *habeas corpus* is a writ of right granted *ex debito justitiae*, but it is not a writ of course. It may be refused if the circumstances are such that the writ should not be issued.

Habeas Corpus now enjoys special constitutional protection by reason of Article 25(d) and 51(2) of the constitution.

998 It cannot be good law to assume or conclude that the expiry of the period ipso facto leads to the conclusion of unlawfulness or illegality of the detention. The effluxion of time per se does no more than impose a duty of explanation. In *Republic v Hussein* [2003] KLR 344, it was held, correctly, that it cannot be said that a person who is detained in police custody for more than twenty four hours is detained unlawfully unless after considering all the circumstances of the case, the court comes to a conclusion that the police acted in unjustified disregard of the provisions of the CPC.

999 [2006] KLR 2.

1000 *Supra*.

CHAPTER FOURTEEN

SPECIAL PROCESSES

Reference has already been made and some discussion recorded on the Children Act, which has provisions respecting the procedure for the trial of children in conflict with the law and the amendments to the Criminal Procedure Code that introduced plea bargaining and victim-impact statements, which reflect recent and modern thinking in the criminal justice field.

Other than these, a few more developments merit attention, especially because they introduce some novel and sometimes highly controversial provisions.

14.1 SEXUAL OFFENCES

The Sexual Offences Act,¹⁰⁰¹ which came into effect on the 21st July 2006, is a statute that came into being mainly as a reaction to the perception that too many sexual offenders were either escaping justice by being acquitted when they ought to have been convicted or being let off the hook too leniently.¹⁰⁰² To deal with these concerns, the statute came up with some processes unavailable elsewhere in the criminal justice process.

a) Definition of Complainant

In a departure from what is provided by the Criminal Procedure Code, this Act expands the meaning of the term, “complainant” to cover not just the alleged victim of sexual offence but also include a person who lodges a complaint on behalf of the alleged victim where the victim is unable or is inhibited from lodging and following up a complaint of sexual abuse.¹⁰⁰³ This is clearly meant to ensure that a case is not defeated by reason of the victim’s inability to follow the matter up personally.

b) Extra Territorial Jurisdiction

The Sexual Offences Act extends the jurisdiction of criminal courts in Kenya to the trial of any sexual offence committed by a citizen or permanent resident of Kenya,¹⁰⁰⁴ quite unlike the general criminal law jurisdiction over which is dependent

1001 Act No. 3 of 2006.

1002 See the case of *Kazungu Chome Ngala v Republic* [2004] eKLR Criminal Case No 1178 of 2003 Kwale.

1003 *Ibid*, s 2(1) .

1004 *Ibid*, s 41.

on the act being done partly or wholly within jurisdiction.¹⁰⁰⁵

c) *Vulnerable Witnesses*

The Sexual Offences Act contains completely new provisions that implicate the manner in which trials are conducted, in particular it provides that certain witnesses may be declared vulnerable with the consequence that certain measure may be taken to not only protect their identity but also protect them from trauma that is likely to arise from their coming face to face with the accused person. Such measures as testifying from behind a protective screen or through a third party known as an intermediary with the related procedure of the accused person asking them questions through the court together with the conduct of the trial in camera all significantly alter the mode and procedure of criminal trials.¹⁰⁰⁶

14.2 INTERNATIONAL CRIMINAL JUSTICE

International criminal justice is governed by the Rome Statute of the International Criminal Court, which was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17th July 1998. Its provisions were domesticated in Kenya with the enactment of the International Crimes Act.¹⁰⁰⁷

The main thrust of this area of law is to make provision for the punishment of certain international crimes namely genocide, crimes against humanity and war crimes, as well as to enable Kenya to cooperate with the International Criminal Court.¹⁰⁰⁸

The Act immediately impacts the general jurisdiction of Kenyan courts in criminal matters in that it creates locally offences that hitherto belonged to the International plane. Further, it throws open the territorial limits of jurisdiction by enabling the court to try and punish the relevant offences notwithstanding that they were committed outside of Kenya.

14.3 ANTI CORRUPTION AND ECONOMIC CRIMES

The issue of corruption and economic crimes looms large in the Kenyan socio-political and legal landscape, and Kenya has gained notoriety of sorts as a graft-ridden nation. At the end of the long reign by the independence party, KANU,

¹⁰⁰⁵ s 6 of the Penal Code.

¹⁰⁰⁶ s 31 of the Sexual Offences Act.

¹⁰⁰⁷ Act No 16 of 2008.

¹⁰⁰⁸ *Ibid*, see preamble.

Special Processes

the new government, elected on the promise of zero-tolerance to corruption, became the first country to simultaneously sign and ratify the United Nations Convention against Corruption, which embodies the International anti corruption legal framework. Even before the coming into being of the Convention, Kenya had already enacted legislation containing most of its provisions.

The Anti Corruption and Economic Crimes Act,¹⁰⁰⁹ apart from creating new offences and providing for their punishment, also makes provisions that implicate the criminal justice process.

a) *Special Magistrates*

The Chief Justice has power to appoint as many special magistrates as may be necessary for such an area(s) to try corruption and economic crimes together with related offences. Such magistrates must be of the rank of a chief magistrate or a principal magistrate, or if appointed from the bar, be senior advocates of at least ten years standing.¹⁰¹⁰

b) *Expedited Hearing of Cases*

The Act makes an express qualification of the trial process as contained in the Criminal Procedure Code by stating that notwithstanding anything contained in the Code, a special magistrate shall as far as practicable hold the trial of an offence on a day to day basis until completion.¹⁰¹¹ This means that the said courts are invested with the privilege and duty to dispose of cases with minimum delay. That there should be any delays, therefore, akin to those that bog down the ordinary criminal trial is evidence of failure of the said courts as well as the prosecutors and practitioners before them, to give effect to a clear statutory command.

c) *Pardon Powers*

The Act also confers upon special magistrates powers, unique and unprecedented, to tender a pardon to any person supposed to have been directly or indirectly concerned in or privy to an offence with a view to obtaining the evidence of any such person. The pardon is granted on condition that the grantee or beneficiary thereof shall make a full and true disclosure of the circumstance within his knowledge relating to the offence and to every other person concerned in its commission.¹⁰¹²

¹⁰⁰⁹ Act No. 3 of 2003.

¹⁰¹⁰ *Ibid*, s 3.

¹⁰¹¹ *Ibid*, s 4(4).

¹⁰¹² *Ibid*, s 5(1).

Essentials of Criminal Procedure in Kenya

The pardon so tendered fully immunizes the beneficiary as it has the effect of a pardon under section 77(6) of the repealed Constitution (article 133(1)(a) of the new Constitution) granted freely or conditionally by the President in exercise of his power of mercy. The pardon under the Act is that efficacious notwithstanding that it is not predicated upon a prior conviction and represents a potent tool for the discovery of critical evidence. It is curious though, that this provision has not been utilized as it would seem that both the KACC and the Anti-Corruption courts are shy to embrace its awesome power.

INDEX

A

Abatement, 201
Absence
 of Accused, 97
Accused
 several, 99
Acquit, 100
Adjournment, 138
Advocate, 166
Affidavit, 212
Affirmation, 149
Alibi, 168
Allocution, 181
Amendment, 85
Anti corruption, 216
Appearance, 137
Appeal, 193
Appellant, 193
Apprehension reports, 119
Arraignment, 89
Arrest, 183
Assault, 4
Attorney General, 5
Autrefois Acquit, 100
Autrefois Convict, 100; 102

B

Bail, 111
Behaviour, 123
Bond, 42
Breach
 of Peace, 38
 of bond, 42
Breaking, 33
Burglary, 179

C

Case
 for defence, 145
 for Prosecution, 141
Cepi Corpus, 213
Charge
 Defective, 84
 Overloaded, 80
Chief Justice, 12
Cognizable offence, 35
Commission, 44
Commissioner of Police, 7
Compensation, 188
Complainant, 137
Complaint, 3
Confirmation, 13
Convict, 100
Conviction, 203
Costs, 188
Count, 72
Court, 9
Court Martial, 213
Court Of Appeal, 13
Custody, 43

D

Death, 209
Death Sentence, 185
Decision, 53
Defect, 41
Defence, 145
Delay principle, 31
Delivery of Judgment, 173
Demeanour, 175
Deposit in lieu of Recognizance, 127
Depositions, 44

Essentials of Criminal Procedure in Kenya

Discharge,
 Absolute, 101
 Conditional, 101
 Dismissal, 137
 Disposal
 of person arrested, 197
 Duplex, 78
 Duplicity, 78

E

Evidence, 142
 Examination,
 of witnesses, 148
 Expenses, 198

F

Failure of Justice, 208
 Felony, 36
 Fine, 186
 Forfeiture,
 of goods, 187
 Form,
 of judgment, 173

G

Good behaviour, 188
 Guilty, 97
Gicheru Rules, 17; 18; 20
 Gazette, 5

H

Habeas Corpus, 213
 Habitual Offender, 55
 High Court, 15

I

Imprisonment, 186
 Information, 71
 Injury, 86; 209

Inquest, 209
 Intent, 74
 Interrogatories, 148
 Irregularity, 208

J

Joinder,
 of counts, 72
 of persons, 74
 Judge, 8
 Judgment, 173
 Judicial Service Commission, 21
 Jurisdiction, 2
 Justice,
 miscarriage of, 155
 rules of natural, 175

K

Keeping the peace, 188
 Kenya Anti Corruption Commission, 7

L

Language,
 of the court, 90; 143
 Lawful Custody, 38
 Limitation, 165
Locus standi, 68
 Lunatic, 157

M

Magistrate, 21
 Manslaughter, 211
 Matter,
 of fact, 201
 of Law, 19
 Medical Officer, 158
 Minister, 209
 Minor,
 Offence, 176
 Misdemeanour, 72

Index

Misjoinder, 73

Motion, 183

Murder, 35

N

Natural justice, 161

Nolle Prosequi, 63

Non,

Appearance, 137

cognizable Offence, 36

payment, 187

Not Guilty, 98

O

Oath, 149

Objection, 103

Offence, 72

Offenders, 135; 178

Offensive weapons, 55

P

Pardon, 217

Particulars, 77

Petition,

of appeal, 196

Plea bargaining, 105

Plead, 91

Police,

Officer, 74

Station, 47

Premises, 31

President's pardon, 89

Previous,

Conviction, 102

Prison,

Officer, 210

Prisoner, 213

Private,

Person, 36; 67

Prosecutor, 67

Proceedings, 71

Procedural due process, 161

Property, 187

Prosecutor,

Public, 6

Prosecution,

close of, 144

Professional privilege, 27

Production order, 42

Q

Question, 111

R

Rebuttal, 147

Recognizance, 129

Record, 90; 91; 107; 142

Re-Examination,

of Witness, 152

Refractory witness, 153

Refusal, 98

Reply, 91; 146

Reserve, 184

Restitution, 106; 108

Restraint, 33; 34

Retrial, 200

Revision, 205

Rules, 75

S

Search,

Warrant, 23

Security, 188

Sentence, 185

Service, 190

Several offences, 22; 79; 179

Shorthand, 142

Solicitor General, 5

State Counsel, 5

Statement of offence, 76

Essentials of Criminal Procedure in Kenya

Subordinate,
court, 12

Summary,
rejection of appeal, 197

Summons, 42; 137; 147

Surety, 127

Swearing, 149; 155; 184

Sworn, 145; 149

T

Time of appeal, 196

Transfer, 160

U

Unlawful, 11; 214

V

Validity, 39

Variance,
between charge and evidence, 86

W

Warrant,
of Arrest, 30; 38; 40; 41
search, 23

Witnesses,
Children, 155
deaf and dumb, 154
hostile, 152
lunatics, 157
refractory, 153

Withdrawal,
from prosecution, 65

PATRICK KIAGE

ESSENTIALS OF
**CRIMINAL
PROCEDURE**
IN KENYA

Written in a clear, concise and engaging style this book presents the entire criminal process in a simple, yet authoritative and informative way. The core principles that underpin the criminal procedure, their rationale and assumptions are well articulated and critiqued. In addition, the book presents by way of illustration a comprehensive range of the latest local judicial decisions. The author's triple heritage as a defence lawyer, state prosecutor and university lecturer makes the book stand out as well informed and balanced work. More importantly, the author presents some practical proposals for reform of the criminal procedure, informed not in the least by the dictates of our new Constitution.

Excerpt

Kathurima M'Inoti
Chairman, Kenya Law Reform Commission

ISBN NUMBER 9966-1511-1-7

ISBN 978-9966-1511-1-7



9 789966 151117

lawAfrica
www.lawafrica.com